(1)

FILED

97 1194 JAN - 9 1998

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN KENTUCKY RESOURCES, ET AL., PETITIONERS,

v.

THE FISCAL COURT OF MAGOFFIN COUNTY, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WALKER P. MAYO III
Counsel of Record

C. THOMAS EZZELL

BOWLES RICE MCDAVID
GRAFF LOVE & GETTY, PLLC
1200 Vine Center Tower
333 West Vine Street
Lexington, Kentucky 40507

COUNSEL FOR PETITIONERS
EASTERN KENTUCKY RESOURCES, INC., ET AL

88 pp

QUESTION PRESENTED

Whether Kentucky's municipal-solid-waste statutory scheme, which allows a county to prohibit the construction of all landfill facilities within the county, is unconstitutional under the Commerce Clause of the United States Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to this proceeding include the Petitioners, Eastern Kentucky Resources, Blue Ash Development, Inc., and Royalton Resources, Inc. These parties are neither subsidiaries nor affiliates of a publicly-owned corporation. The Respondents to this Petition include the Fiscal Court of Magoffin County, Kentucky, Paul E. Patton, in his capacity as Governor of the Commonwealth of Kentucky, and James E. Bickford, in his capacity as Secretary of the Natural Resources and Environmental Protection Cabinet of the Commonwealth of Kentucky.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF APPENDICES v

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 5

I. THE OPINION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT AND RAISES SUBSTANTIAL QUESTIONS OF CONSTITUTIONAL LAW WHICH SHOULD BE ADDRESSED BY THE SUPREME COURT 5

A. The Passage Of Statutes And Regulations With An Intent To Prohibit Interstate Movement Of Goods Violates The Commerce Clause .. 7

B. The Passage Of Statutes And Regulations With The Effect Of Prohibiting Interstate Movement Of Goods Violates The Commerce Clause 11

C. The Opinion Below Is In Conflict With Both The Precedent Of The Supreme Court And Of The Eleventh Circuit 16

CONCLUSION 18

TABLE OF APPENDICES

		Page
APPENDIX A	Opinion of the United States Court of Appeals for the Sixth Circuit in *Eastern Kentucky Resources v. Fiscal Court of Magoffin County, Kentucky*, 127 F.3d 532 (6th Cir. 1997)	1a
APPENDIX B	Findings of Fact, Conclusions Of Law And Partial Summary Judgment of the Federal District Court for the Eastern District of Kentucky in *Eastern Kentucky Resources v. Fiscal Court of Magoffin County, Kentucky* (Civil Action No. 94-62)	28a

TABLE OF AUTHORITIES

CASES: Page

Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935) 15

Brimmer v. Rebman, 138 U.S. 78 (1891) 13

C & A Carbone v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994) 6, 7

Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992) 7, 11

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 6, 17

Crutcher v. Kentucky, 141 U.S. 47 (1891) 16

Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 13, 14, 18, 19

Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources, 504 U.S. 353 (1992) 7, 11, 16, 17, 18

GSW v. Long County, Georgia, 999 F.2d 1508 (11th Cir. 1993) 15, 16, 18

Hughes v. Oklahoma, 441 U.S. 322 (1979) 6, 12

Lewis v. B.T. Inv. Managers, 447 U.S. 27 (1980) 7

Maine v. Taylor, 477 U.S. 131 (1986) 12

Oregon Waste Systems v. Department of Environmental Quality, 511 U.S. 93 (1994) 7

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 4, 5, 6, 12, 14

STATUTES

Kentucky Revised Statute, § 224.40-315(1) 2

Kentucky Revised Statute, § 224.40-315(2) 2-3

UNITED STATES CONSTITUTION

Article I, Section 8 2

OTHER

Stanley E. Cox, *What May States Do About Out-of-State Waste In Light of Recent Supreme Court Decisions Applying The Dormant Commerce Clause? Kentucky As Case Study In The Waste Wars*, 83 Ky. L.J. 551, 604 (1994-95). 10-11

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN KENTUCKY RESOURCES, ET AL., PETITIONERS

v.

THE FISCAL COURT OF MAGOFFIN COUNTY, ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners respectfully request the issuance of a Writ of *Certiorari* to review the Opinion of the United States Court of Appeals for the Sixth Circuit in this case filed on October 15, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (1a)[1] affirming the decision of the United States District Court for the Eastern District of Kentucky is reported at 127 F.3d 532. The Findings of Fact, Conclusions of Law and Partial Summary Judgment of the United States District Court for the Eastern District of Kentucky (28a) is unreported.

---

[1] Citations herein to material printed in the Appendices appear as "____a."

JURISDICTION

The United States Court of Appeals for the Sixth Circuit decided and filed its Opinion on October 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8 of the Constitution of the United States provides in pertinent part as follows:

The Congress shall have Power...To Regulate Commerce with foreign Nations, and among the several States...

Ky. Rev. Stat. Section 224.40-315(1) states:

> No permit to construct or expand a municipal solid waste disposal facility shall be accepted for processing by the Cabinet unless the application contains a determination from the Governing Body for the solid waste management area in which the facility is or will be located concerning the consistency of the application with the Area Solid Waste Management Plan...

Ky. Rev. Stat. Section 224.40-315(2) states:

> No permit to construct or expand a solid waste disposal facility shall be approved unless the applicant demonstrates and the Cabinet makes a written finding in the preliminary determination that the application conforms to and is consistent with all of the following: (a) the capacity needs

identified in the Area Solid Waste Management Plan; (b) Other elements of the Area Solid Waste Management Plan, for permit applications filed after approval of those elements...

STATEMENT OF THE CASE

In 1991, the Kentucky General Assembly enacted Senate Bill 2 in an Extraordinary Session called by then-Governor Wallace Wilkinson. Senate Bill 2 substantially rewrote the Kentucky laws governing solid waste. The Extraordinary Session occurred, and Senate Bill 2 was enacted, largely because of public opposition within Kentucky to the acceptance of out-of-state waste. The challenged provisions allowed local governments and the Commonwealth to work together to exclude the disposal of out-of-state waste in Kentucky.

In 1991, Eastern Kentucky Resources, Blue Ash Development, Inc., and Royalton Resources, Inc., (collectively "EKR") purchased property in Magoffin County to develop a landfill which would accept 4,000 to 10,000 tons of solid waste per day. Most of this waste would come from outside of Kentucky. The EKR proposed landfill was originally included in the Magoffin County Area Solid Waste Management Plan which was approved by the Kentucky Natural Resources and Environmental Protection Cabinet (the "Cabinet"). Subsequently, the Cabinet withdrew its approval of the Magoffin County Area Plan and refused to process EKR's permit application. Later, Magoffin County revised its Area Plan to exclude the EKR proposed landfill. This revised Area Plan was approved by the Cabinet. EKR brought this action because it was excluded from the Magoffin County Area Plan and could not get its permit application processed because it proposed to accept out-of-state waste.

The parties to this action filed Cross Motions for Partial Summary Judgment in the District Court. The Defendants also filed Motions to Dismiss. EKR's Motion for Partial Summary Judgment asserted that the capacity assurance and capacity authorization provisions of KRS Chapter 224 were unconstitutional, on their face, in their purpose, and in their direct practical effect. Defendants' Cross Motions for Partial Summary Judgment addressed the same challenged provisions and actions. On September 21, 1996, the District Court granted Defendants' Motions for Partial Summary Judgment and denied EKR's motion. The Court also granted Defendants' Motions To Dismiss, ruling that EKR had failed to exhaust available administrative remedies and also dismissed EKR's other claims for relief. The District Court noted that an analysis of state laws requires a Court to, "distinguish between outright economic protectionism and more indirect burdens on the free flow of trade." Findings of Fact, Conclusions of Law and Partial Summary Judgment at 24 (47a). The District Court also recognized that a statute may be facially discriminatory, discriminatory in practical effect, or discriminatory in purpose. *Id.* (47a.) However, the District Court held that Senate Bill 2 does not discriminate in practical effect nor was it the product of discriminatory purpose. *Id.* at 28, 32 (52a, 54a). EKR filed a timely Notice of Appeal on October 5, 1995.

The District Court concluded that the Commonwealth had carried its burden of establishing that Senate Bill 2 furthers legitimate local goals in, "an evenhanded manner." *Id.* at 35 (55a). Considering the legislation in relation to the *Pike* test, the Court held, "the burden for a landfill developer of being considered in a local plan and getting a local determination is outweighed by the undisputed benefits from derived [sic] the Commonwealth's implementation of SB 2." *Id.* at 36 (56a) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

On appeal, the Court of Appeals rejected EKR's contention that Senate Bill 2 was enacted with the purpose of protecting local economic actors. 127 F.3d 532, 542 (21a). The Court of Appeals noted with approval the District Court's determination that the legislation had no discriminatory effect on interstate commerce. *Id.* at 544 (25a). The Court of Appeals also considered the effect of the legislation under the *Pike* test. Agreeing with the District Court, the Court of Appeals held, "the Commonwealth's clearly legitimate goals outweigh the burdens, if any, that are placed upon interstate commerce." *Id.* at 545 (27a). The Court of Appeals concluded that because the legislation lacked discriminatory effect and because the Commonwealth's goals outweighed any burdens on interstate commerce the decision of the District Court should be affirmed. *Id.* (27a).

REASONS FOR GRANTING THE PETITION

I. The Opinion Below Conflicts With The Decisions Of The Supreme Court And Raises Substantial Questions Of Constitutional Law Which Should Be Addressed And Clarified By The Supreme Court.

The legal framework to determine whether a state statute which burdens interstate commerce violates the Commerce Clause is well established, and the parties to this dispute do not disagree on this point. The Supreme Court has clearly established a two-pronged analysis to determine the validity of a state law in the face of a Commerce Clause challenge.

The first method of analysis is applied where the statute discriminates against interstate commerce either on its face or in practical effect. Recognizing solid waste and solid waste services are articles of commerce under the Commerce Clause, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-623

(1978); and *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 391 (1994), the Supreme Court has established a virtual *per se* rule invalidating any regulation which discriminates against interstate commerce. *City of Philadelphia*, 437 U.S. at 624. The rationale for invalidating state and local regulations which discriminate against interstate commerce, "is to prohibit state or municipal laws whose object is local economic protectionism, laws which would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *Carbone*, 511 U.S. at 390.

The second method of analysis considers apparently neutral regulations. This method of analysis was described in *Pike v. Bruce Church, Inc.* as follows:

> Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

397 U.S. 137, 142 (1970).

In *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), the Supreme Court explained how these two tests are to be applied:

> [W]e must inquire (1) whether the challenged statute regulates even handedly with only "incidental" effects on interstate commerce or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote

this local purpose as well without discriminating against interstate commerce.

As the Supreme Court explained in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353, 359 (1992), legislation that discriminates against interstate commerce will be strictly scrutinized and is invalid unless the state or local government can show that the discrimination is justified by a valid factor unrelated to economic protectionism. *Carbone, supra*; *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93 (1994). In addition, a finding that state legislation constitutes economic protectionism and is therefore invalid may be made on the basis of a discriminatory purpose. *See, e.g., Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 344 (1992); *Lewis v. B.T. Inv. Managers*, 447 U.S. 27, 39 (1980).

In this action, the challenged provisions of KRS Chapter 224, both directly and by incorporating the Magoffin County Area Plan, were enacted to and have had the effect of preventing the continued flow of out-of-state waste into the Commonwealth of Kentucky generally and into Magoffin County specifically.

A. The Passage Of Statutes And Regulations With An Intent To Prohibit Interstate Movement Of Goods Violates The Commerce Clause.

In September 1990 then-Governor Wilkinson requested that the University of Kentucky prepare a comprehensive report on solid waste and present options for dealing with solid waste. The University of Kentucky prepared *Kentucky Solid Waste Management Study: Issues and Options*, September 17, 1990

(the "Solid Waste Study") (R.72)[2]. One of the principal concerns of the Solid Waste Study was how to slow down or prevent the entry of out-of-state waste into Kentucky. The introduction to the Solid Waste Study at page i states "the Commonwealth's existing solid waste management strategies must be expanded in the near future to more fully address problems associated with capacity management and assurances and with disposal of waste, *especially from sources outside of the Commonwealth.*" (Emphasis added). The goal of stopping out-of-state solid waste was a central theme of the Solid Waste Study. The Solid Waste Study provided a blue-print for the Governor and the General Assembly on how to attempt the exclusion of out-of-state waste.[3]

In justifying the Kentucky statutory provisions challenged by EKR, the Sixth Circuit stated that EKR had failed to present any evidence showing that the study "impacted" the legislature. 127 F.3d 532, 543 (21a). It is important to note that Kentucky has no recorded legislative history for the General Assembly. Examination of the study itself, however, indicates the Commonwealth's obvious intent to prevent the continued flow of out-of-state waste.

---

[2] Citations herein to material in the Joint Appendix before the Sixth Circuit appear as "R.__."

[3] In order to best deal with out-of-state waste, the Solid Waste Study recommended the following:

> The experience of numerous other states that have attempted to ban or control importation of solid waste suggests that the most feasible and effective long-term option for dealing with the problem of disposal of solid waste is comprehensive solid waste planning accompanied by integrated management of the comprehensive plan.
>
> Solid Waste Study, pgs. 144-145.

The study was conducted by the University of Kentucky, a state agency. Dr. Charles T. Wethington, Jr., then Interim President of the University of Kentucky, prepared the study at the request of Governor Wilkinson. Governor Wilkinson was responsible for Dr. Wethington's appointment. In addition, the Commonwealth's role in the study is highlighted by the fact that Dr. John D. Kiefer, the Assistant State Geologist for the Kentucky Geological Survey, served as the Project Coordinator for the study. Finally, the authors of the study acknowledged the support of Governor Wilkinson and numerous other state agents for assistance with the project. From this, it becomes clear that the study and the interests of the Commonwealth were singular.

The Solid Waste Study was completed in September 1990, and in February 1991, the General Assembly enacted Senate Bill 2. The challenged provisions of Senate Bill 2 are those which implement the capacity assurance and capacity authorization provisions recommended by the Solid Waste Study.

The intent to prevent the flow of out-of-state waste was also reflected by the actions of Magoffin County. In November 1993, elections were held for the Magoffin County Fiscal Court. A central theme of the campaign was the vigorous and outspoken opposition to EKR's proposed landfill because it would have accepted out-of-state waste. Then-Governor Jones appeared at a rally for landfill opponents, which was televised on the evening news. The Governor stated, "you know when I took office there was a strong move to try to develop a dump here in Magoffin County, and I just felt that it was wrong to be bringing out-of-state garbage and stink up a beautiful wonderful place like Magoffin County." (R.72). Similarly, then-candidate for Judge-Executive of the Fiscal Court, Charles Hardin, ran a paid advertisement in the local newspaper during his 1993 campaign stating in part, "say 'No!' to EKR...Charles Hardin [has taken]

a leadership role in the fight against Eastern Kentucky Resources and *out-of-state garbage*. The fact is if Dr. Hardin and many other citizens had not taken the initiative to fight EKR's proposed mega-dump *we'd be dodging garbage trucks from New Jersey today." Salyersville Independent*, February 6, 1992. (R.72) (Emphasis added). This view was shared by other Magoffin County politicians. David Patrick, the County Magistrate for the Fiscal Court of Magoffin County from January 1, 1990 until December 31, 1993, stated in his Affidavit in support of the Defendants' Motion for Summary Judgment, "the principal reason for this opposition is that EK Resources intends to accept out-of-state solid waste at its proposed landfill." (R.72). Nonetheless, both the District Court and the Court of Appeals determined that EKR had, "failed to present any evidence which demonstrates that the challenged provisions have a discriminatory purpose." *Eastern Kentucky Resources*, 127 F.3d at 543 (22a).

In considering the purpose behind the passage of Senate Bill 2, one well-informed commentator has observed:

> One working premise of the 1991 Special Session was that the number of disposal facilities to be allowed to operate in Kentucky was to be driven by capacity needs identified in local Kentucky government plans. The additional assumption was that private in-state facilities could be captured primarily for in-state use. Such capture is clearly unconstitutional under *Fort Gratiot*.

Stanley E. Cox[4], *What May States Do About Out-of-State Waste In Light of Recent Supreme Court Decisions Applying The Dormant Commerce Clause? Kentucky As Case Study In The Waste Wars,* 83 Ky. L.J. 551, 604 (1994-95).

From this, it is clear that the General Assembly's intent to prevent the flow of out-of-state waste into the Commonwealth manifested itself in Senate Bill 2. Moreover, it is clear that Magoffin County's actions were motivated by the intent to prevent the importation of out-of-state waste into Magoffin County.

B. The Passage Of Statutes And Regulations With The Effect Of Prohibiting Interstate Movement Of Goods Violates The Commerce Clause.

The District Court and the Court of Appeals also rejected the argument that the challenged statutes discriminated against out-of-state waste in practical effect. Since the passage of Senate Bill 2, of the 118 designated solid waste management areas in the Commonwealth, at least 85 areas provide no capacity whatsoever for out-of-area (and thus out-of-state) waste in their Cabinet-approved Area Plans, thereby precluding both the disposal of any

---

[4] Mr. Cox is an Assistant Professor of Law at the New England School of Law. During his work for the Kentucky Office of Attorney General in 1990-92, Mr. Cox advised on the constitutionality of legislation proposed for the 1991 special session of the General Assembly; co-authored Amicus Briefs In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S.Ct. 2019 (1992), and *Chemical Waste Management, Inc. v. Hunt,* 112 S.Ct. 2009 (1992); and issued numerous informal opinion letters on waste issues. Mr. Cox explains his bias in the article as belonging to the author, "but they are, of course, partly colored by these earlier experiences and by his previous work on behalf of citizen-group plaintiffs opposed to expansion of landfills designed to receive primarily out-of-state trash." Cox, note a., at 629.

out-of-state waste within their boundaries and the siting of any new landfills for the disposal of out-of-state waste. The thirty or so Areas that have allowed some out-of-area capacity have done so only on a limited basis or with additional restrictions.[5] Despite the additional restrictions on out-of-state waste, and Magoffin County's refusal to approve EKR's landfill, the Appeals Court stated, "EKR does not demonstrate how local economic actors are favored at the expense of out-of-state economic actors." *Id.*, at 544 (24a).

Both the District Court and the Sixth Circuit applied the balancing test of *Pike v. Bruce Church, Inc.* to determine the constitutionality of the challenged provisions of KRS Chapter 224, instead of subjecting such act to the "more demanding scrutiny", *See, Maine v. Taylor*, 477 U.S. 131, 138, which would have been required under *Hughes v. Oklahoma*, 441 U.S. 322 (1979), if the Courts had determined that such act discriminates against interstate transactions. Significantly, the Court of Appeals did not address the issue of whether the Commonwealth

---

[5] For example, Logan County's host agreement with Southern Sanitation Company, Inc. limits the acceptance of solid waste at its landfill to 475 tons per day from areas outside Logan County listed in the host agreement, none of which are outside Kentucky. Franklin County's host agreement with Browning-Ferris Industries of Kentucky, Inc. ("BFI"), requires the BFI landfill to reserve sufficient capacity for that area's disposal needs for ten years and allows the BFI landfill to use its remaining capacity only "for disposal of waste generated in Kentucky." R.32.

A number of areas have submitted, and the Cabinet has approved, citing procedures for landfills which refuse to site any proposed landfill with capacity for waste outside of the area. In addition a number of areas in the Commonwealth discriminate against out-of-area waste by imposing differential fees. For example, Franklin County and Rowan County have host agreements with landfills which impose fees of 5% of the landfills gross receipts from out-of-area waste. R.32.

had sustained the burden of demonstrating that its purported purpose in enacting the Senate Bill 2, "could not be served as well by available nondiscriminatory means." *Id.*, at 138. By determining that the challenged provisions of KRS 224 do not discriminate against interstate commerce, because they also discriminate against some in-state commerce, the decisions below directly conflict with the Supreme Court's decision in *Dean Milk v. Madison*, 340 U.S. 349 (1951), and other decisions of the Supreme Court which stand for the principle that "it is immaterial," for purposes of determining whether the legislation discriminates against interstate commerce, "that [other instate commerce] is subjected to the same prescription as that moving in interstate commerce." *Id.*, at 354.

In *Dean Milk* the Supreme Court invalidated a Madison, Wisconsin ordinance which prohibited the sale of pasteurized milk within the City of Madison unless such milk had been processed at an approved pasteurization plant within a radius of five miles from the central square of Madison. In a fashion similar to the challenged provisions of KRS Chapter 224, the Madison ordinance subjected most Wisconsin milk to the same prescription as out-of-state milk. Nonetheless, the Supreme Court held that the ordinance "plainly discriminates against interstate commerce", *Id.*, at 354, noting that "it is immaterial that Wisconsin milk from outside the Madison area is subjected to the same prescription as that moving in interstate commerce. *Cf. Brimmer v. Reban*, 138 U.S. 78, 82-83 (1891)" 340 U.S. at 354 n.4. The Court continued on to hold that the Madison ordinance violated the Commerce Clause because reasonable non-discriminatory alternatives, adequate to serve legitimate local interest, were available. By ignoring the teachings of *Dean Milk*, and holding that state legislation which excludes interstate commerce from local areas will not be deemed to discriminate against interstate commerce, so long as other nonlocal in-state commerce is subject to the same prohibitions, the Court of

Appeals has espoused a new principle which will have pernicious effects on the application of the Commerce Clause to future protectionist state legislation. If the opinion of the Court of Appeals is correct, a state would hereafter be permitted to enact legislation which authorizes local governments or districts to prohibit the importation of or impose discriminatory taxes upon numerous articles of commerce such as milk, meat, and ethanol as well as waste which are produced outside the boundaries of such government or districts unless those who were adversely affected by such burdens could show that the burdens imposed on such commerce were not, "clearly excessive in relation to the putative local benefits" sought to be achieved by such legislation. *See*, *Pike v. Bruce Church, Inc.*, 397 U.S. at 142.

For example, if it were true, as the Court of Appeals states in its opinion, that it is permissible under the Commerce Clause to establish a framework of legislation which, while not facially discriminating against out-of-state waste, allows local governments or regional areas to enact legislation that has the same effect so long as the *Pike* test can be satisfied, then notwithstanding the Supreme Court's decision in *Dean Milk*, the City of Madison could now adopt an ordinance which restricted the importation of milk pasteurized outside the city limits provided that it could persuade a court that the ordinance, because it only affected milk sold in Madison, did not impose a burden on interstate commerce which was clearly excessive in relation to the putative local benefits sought to be achieved by such ordinance. As a consequence, it is inevitable that the decisions below, if allowed to stand will, as Justice Clark warned in *Dean Milk*, "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause" 340 U.S. at 356, and will effectively subvert the principle which was reiterated in *Dean Milk* that "one state in its dealings with

another may not place itself in a position of economic isolation. *Baldwin v. Seelig, Inc.*, [294 U.S. 511] at 527." *Id.*, at 356.

In *GSW v. Long County, Georgia*, 999 F.2d 1508 (11th Cir. 1993), the Eleventh Circuit considered the effect of banning all waste disposal within a geographic zone of a state. GSW entered into an agreement with Long County, Georgia to construct a private landfill in Long County, to charge a tipping fee to all users, and to give a percentage of the revenues to the County. The contract did not contain any geographic restrictions on the origins of the waste, and specifically authorized the facility to accept waste from outside of Long County. Several months after entering the contract, Long County passed a resolution limiting the origin of waste to be disposed at the proposed facility to a 150 mile radius of Long County. After GSW refused to give certain assurances requested by Long County, Long County wrote a letter rescinding the contract with GSW. GSW filed suit on the ground that the county's recision of the contract was an attempt to discriminate against interstate commerce. The Court of Appeals at pages 1517-1518 ruled as follows:

> The County further argues that its actions do not violate the Commerce Clause because the recision of the contract prevents the facility from being built and has the effect of banning of all waste disposal, not just waste from outside the county. Thus the County distinguishes its actions from the statutes at issue in City of Philadelphia, Hunt and Fort Gratiot, all of which had a discriminatory effect. However, this Court cannot ignore the recision. Long County could have decided not to contract for waste disposal services and not to license a potential provider of such services without violating the Commerce

> Clause; but once it decided to contract for services and then to place a restriction, it cannot escape constitutional scrutiny.

The Court's ruling in *GSW* is directly on point. Magoffin County entered into an agreement with EKR, included the proposed EKR landfill in the area plan, and later adopted a new area plan excluding all landfills in order to prevent out-of-state waste from entering Magoffin County. As stated by this Court:

> To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States.

Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

C. The Opinion Below Is In Conflict With Both The Precedent Of The Supreme Court And Of The Eleventh Circuit.

Finally, it is important to note that the provisions of Senate Bill 2 are not significantly different from the similar Michigan provision held unconstitutional by the Supreme Court in 1992 in the *Fort Gratiot* case. In *Fort Gratiot*, the Supreme Court considered the constitutionality of a 1988 Michigan solid waste flow control scheme that was identical in all relevant respects to the scheme enacted in Kentucky under Senate Bill 2. Michigan's Solid Waste Management Act required each Michigan county to estimate the amount of solid waste that would be generated in the county over the next twenty years and to adopt a plan to provide for its disposal at solid waste facilities which complied with the state's health standards. *Fort Gratiot*,

504 U.S. at 355-56. In 1988, the Michigan Legislature amended the state's Solid Waste Management Act by adopting provisions which prohibited the acceptance of solid waste generated outside the county at the disposal facility unless explicitly authorized in the approved county plan. *Id.*, at 357. In *Fort Gratiot*, the Supreme Court held that the 1988 amendment to Michigan's Solid Waste Management Act "unambiguously discriminated against interstate commerce and are appropriately characterized as protectionist measures that cannot withstand scrutiny under the Commerce Clause." *Id.*, at 367-368. This Court also noted that Michigan's restricted flow control provisions authorized "each of its 83 counties to isolate itself from the national economy." *Id.*, at 361. Adhering to its holding in *City of Philadelphia*, the Supreme Court concluded that the Michigan statute was unconstitutional. *Fort Gratiot*, U.S. at 367-68. Under this analysis, the same result must be reached as to Magoffin County's attempt to exclude out-of-state waste.

As stated above, Kentucky's flow control scheme allows individual Areas to authorize capacity for out-of-area waste in their approved area plans. In *Fort Gratiot*, the Supreme Court determined that such controls are unconstitutional. As the Supreme Court stated, "St. Clair county's total ban on out-of-state waste is unaffected by the fact that some other county's have adopted a different policy." *Id.* at 363. "In short," the Court stated, "neither the fact that the Michigan statute purports to regulate intercounty commerce in waste nor the fact that some Michigan counties accept out-of-state waste provides an adequate basis for distinguishing this case from *Philadelphia v. New Jersey*." *Id.*, at 363. The challenged Kentucky provisions are virtually identical and have absolutely the same effect on interstate commerce.

Not only is there a conflict between the precedent of the Supreme Court and the Sixth Circuit's Opinion, but there also

exists a conflict between the Sixth Circuit's Opinion and the precedent of the Eleventh Circuit. As noted above, *GSW* held the actions of a county to prevent the importation of out-of-state waste were in violation of the Commerce Clause.

Pursuant to the challenged statutes in KRS Chapter 224, a county in Kentucky now has the right to completely exclude the interstate flow of waste by refusing to allow the expansion and siting of any new landfills. By doing so, each individual county in the Commonwealth can follow the same course as Magoffin County and halt all flow of out-of-state waste into the Commonwealth of Kentucky. If every state were to adopt similar legislation, the flow of waste throughout the nation could be halted. Each county would be able to restrict all waste from flowing into and out of its perimeters. For this reason, review by this Court of the decision below is necessary.

CONCLUSION

This case presents the question of whether Kentucky or any other state may authorize, or require compliance with, county legislation or regulations which allow local governing bodies to interfere with the free flow of out-of-state, as well as out-of-county, waste. This case thus raises the question of whether *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources* should remain the law of the land. However, if *Fort Gratiot* is to be overruled, then only this Court should do so. On the other hand, if *Fort Gratiot* is not to be overruled, then this Court should not permit it to be subverted by the adoption of a pernicious new principle, espoused by the Court of Appeals that, notwithstanding *Dean Milk*, the erection of local barriers to interstate commerce does not constitute discrimination against interstate commerce so long as other in-state commerce is subjected to the same proscription. Such a principle cannot be permitted to stand because it invites localities throughout the

country to enact legislation which discriminates against articles of commerce generated outside of such localities, including articles of interstate commerce, and to create thereby a "multiplication of preferential trade areas destructive of the very purpose of the commerce clause." *Dean Milk*, 340 U.S. at 356. Accordingly, a Writ of *Certiorari* should issue to review the decision below.

Respectfully submitted,

WALKER P. MAYO III
Counsel of Record

C. THOMAS EZZELL

BOWLES RICE MCDAVID
GRAFF LOVE & GETTY, PLLC
1200 Vine Center Tower
333 West Vine Street
Lexington, Kentucky 40507
(606) 225-8700

COUNSEL FOR PETITIONERS
EASTERN KENTUCKY RESOURCES,
INC., ET AL.

APPENDIX A

EASTERN KENTUCKY RESOURCES, ET AL.,
Plaintiffs/Appellants,

v.

THE FISCAL COURT OF MAGOFFIN COUNTY, KENTUCKY, ET AL.,
Defendants/Appellees

No. 95-6360

UNITED STATES COURT OF APPEALS,
6TH CIRCUIT

Argued March 21, 1997 **Decided October 15, 1997**

Before: KEITH, MERRITT AND COLE, Circuit Judges

COUNSEL

ARGUED: Richard A. Getty, BOWLES, RICE, MCDAVID, GRAFF, LOVE & GETTY, Lexington, Kentucky, for Appellant. Kathryn M. Hargraves, NATIONAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET, OFFICE OF LEGAL SERVICES, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Richard A. Getty, Walker P. Mayo, BOWLES, RICE, MCDAVID, GRAFF, LOVE & GETTY, Lexington, Kentucky, Leonard Knee, BOWLES, RICE, MCDAVID, GRAFF, LOVE & GETTY, Charleston, West Virginia, for Appellant. Kathryn M. Hargraves, Kathryn R. Matheny, Karen H. Rippy, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET, OFFICE OF LEGAL SERVICES, Frankfort, Kentucky, for Appellee.

OPINION

DAMON J. KEITH, Circuit Judge. The Plaintiffs, Eastern Kentucky Resources, Blue Ash Development, Inc., and Royalton Resources, Inc. (collectively "EKR") sought a declaratory judgment and injunctive relief in this action challenging the constitutionality of Kentucky's solid waste disposal program. The Defendants are various state officials of the Commonwealth of Kentucky (collectively "the Commonwealth"). EKR appeals the order of the district court dismissing its claims and granting summary judgment to the Commonwealth. For the reasons discussed below, we **AFFIRM**.

I. STATEMENT OF FACTS

A. BACKGROUND

In 1990, Wallace G. Wilkinson, then-Governor of Kentucky convened a special legislative session, the 1991 Extraordinary Session, on garbage. The district court found that there were many events that led to this legislative session. These included poor collection practices, which had resulted in continued open dumping, the existence of environmental hazards, concerns for the amount of garbage generated per person in the Commonwealth, the fear that the Commonwealth was running out of garbage space as a result of the rapid rate at which existing landfills were filling up, and concern with the amount of refuse imported outside of the Commonwealth's borders. At the time that the session was convened, the Commonwealth had declared an environmental sate of emergency because of the deplorable effects caused by the ineffectiveness of its then-current waste disposal program. EKR, however, maintains that the Extraordinary Session was convened, almost exclusively, because of the Commonwealth's opposition to the importation of out-of-state waste.

B. THE COMMONWEALTH'S WASTE MANAGEMENT PROGRAM

On February 21, 1991, at the 1991 Extraordinary Session, the Kentucky General Assembly enacted Senate Bill 2 ("SB 2"). SB 2 establishes a comprehensive and integrated waste management program designed to reduce the amount of solid waste disposal facilities in the Commonwealth, and to encourage a regional approach to solid waste management. SB 2 contains sixty-three parts addressing a variety of solid waste-related subjects, including garbage reduction strategies, issuance of landfill permits, state and local solid waste planning, garbage collection, tax incentives for recycling, and public participation in local solid waste planning.

SB 2 has three primary elements. First, local planning areas are required to offer universal refuse collection as part of the Commonwealth's goal to reduce--if not eliminate--illegal dumping, and to provide Kentuckians with maximum access to collection services. It is the duty of the local planning area to dispose of garbage generated within its area. This can be done by hosting a landfill, or by marketing local garbage outside of the area. Second, the plan contains a prospective element. SB 2 mandates the implementation of various recycling programs in order to reduce the amount of refuse generated per person, as well as to stem the flow of refuse streaming into the Commonwealth's landfills. One of the bill's goals is to reduce by 25% the amount of municipal solid waste generated by Kentuckians by 1997. Third, the legislature imposed upon local governments the duty to plan ahead to assure that adequate disposal capacity exists for waste generated within the Commonwealth, and to account for all available landfill capacity in the Commonwealth.

To accomplish these tasks, local governments were instructed to collaborate and to establish local solid waste planning areas. The purpose of these planning areas are to develop and implement area-wide solid waste management plans. The plans are to include among other requirements: a description of the solid waste disposal site; the recycling and composting facilities available in the area; projections on the area's population growth and waste disposal needs for five, ten and twenty years, respectively; specific provisions to assure that adequate capacity exists for municipal solid waste generated in the are for a ten year period; and a plan to clean up open dumps in the local planning area. The bill also included a deadline by which plans were to be submitted to the Natural Resources and Environmental Protection Cabinet ("the Cabinet"). A local planning area's failure to submit a plan authorizes the Cabinet to prepare a plan for that area or to place that area in an established planning area. If a local planning area fails to execute a plan, Kentucky agencies are not allowed to endorse any solid waste projects in that area.

The Cabinet is the official planning and management agency of the Commonwealth's solid waste program. It is the duty of the Cabinet to develop a statewide solid waste reduction and management plan. It is primarily responsible for coordinating the solid waste planning and management activities of waste management areas, and for approving waste management facilities. It is the responsibility of the Cabinet to review applications for permits to construct or substantially expand existing municipal solid waste facilities. The Cabinet reviews applications for those permits for consistency with area solid waste management plans. The Cabinet is also authorized to establish standards for the disposal of solid waste in landfills and incinerators, and to require compliance with those standards when issuing permits.

SB 2's distinctive feature is that it conditions the issuance of landfill permits on local solid waste planning rather than design standards as was customarily the practice. Before a would-be landfill developer submits an application for a new landfill or a substantial expansion of an existing landfill to the Cabinet, the governing body of the local planning area must review the request to ascertain its consistency with local solid waste management plans. SB 2 links the issuance of landfill permits to local solid waste management plans with the goal of requiring government officials, local citizens, and landfill developers to work together on waste-related issues. Once the local planning agency has reviewed the application, the applicant may then submit it to the Cabinet for its approval. The Cabinet is free to accept or reject the local planning agency's determination. However, if it disagrees with the agency's determination, it must make written and detailed findings explicating its reasoning.

C. THE CONTESTED PROVISIONS

Two parts of SB 2 are at issue in this case: Kentucky Revised Statute Chapter 224 subchapter 40 section 315 ("KRS 224.40-315"), and Kentucky Revised Statute Chapter 224 subchapter 43 section [345] ("KRS 224.43-345") (collectively "the challenged provisions"). KRS 224.40-315 states:

> (1) No permit to construct or expand a municipal solid waste disposal facility shall be accepted for processing by the cabinet unless the application contains a determination from the governing body for the solid waste management area in which the facility is or will be located concerning the consistency of the application with the area solid waste management plan submitted under KRS 224.43-345(1)(a) to (d) and (l) until January 1, 1993, and the entire plan after January 1, 1993. The governing body for the area shall, within sixty (60) days

of receipt of a written request, make the determination after public notice and opportunity for public comment and public hearing. For applications with a notice of intent filed prior to February 26, 1991, the cabinet shall continue to process the application but no permit shall be approved until the governing body for the solid waste management area in which the facility is or will be located has made a determination in accordance with this section.

(2) No permit to construct or expand a municipal solid waste disposal facility shall be approved unless the applicant affirmatively demonstrates and the cabinet makes a written finding in the preliminary determination made pursuant to KRS 224.40-310(2)[1] that the application conforms to and is consistent with all of the following:

(a) The capacity needs identified in the area solid waste management plan;

---

[1]KRS 224.40-310(2) states:

(2) No permit to construct or expand, when the expansion results in substantial additional capacity, a waste disposal facility shall be issued until a complete application has been submitted to and approved by the cabinet and notice of the application has been published, as provided for in subsections (4) and (5) of this section, at the expense of the applicant in a manner reasonably calculated to inform that portion of the public which is most likely to be affected by the operation of the proposed waste disposal facility. The publication shall take place after the cabinet has determined the application to be technically complete and issued a draft permit.

(b) Other elements of the area solid waste management plan, for permit applications filed after approval of those elements;
(c) The statewide solid waste reduction and management plan, for permit applications filed after completion of the plan; and
(d) Applicable zoning regulations adopted pursuant to KRS Chapter 100.

(3) If the cabinet approves a permit to construct or expand a municipal solid waste management facility after the governing body for the area has determined the application to be inconsistent with the area solid waste management plan, as part of the written finding the cabinet shall state in detail the reasons why it did not accept the determination of the governing body for the area.

(4) For the purposes of this section, the term municipal solid waste disposal facility includes, in addition to those facilities defined in KRS 224.01-010(15), any residual or contained landfill or incinerator disposing of industrial solid waste for a fee, but does not include a waste site or facility which is operated exclusively by a solid waste generator on property owned by the solid waste generator which accepts only industrial solid waste from the solid waste generator or industrial solid waste generated at another facility owned and operated by the generator or wholly-owned subsidiary.

KRS 224.43-345 states:

(1) Each area solid waste management plan shall be prepared in accordance with administrative regulations to

be adopted by the cabinet and shall be required to include the following:

(a) Identification of the area that will be included in the plan;

(b) A demographic study of the planning area of current and projected populations five (5), ten (10) and twenty (20) years in the future. A projection of the amount and source of solid waste generated and requiring disposal at municipal solid waste disposal facilities for each of these time periods shall be provided;

(c) An inventory and description of all existing solid waste management facilities and activities. The description shall include their identity, location, life expectancies, ownership, cost to the users, and level of compliance with state and federal laws. The description is not required to include any solid waste management facility which is operated exclusively by a solid waste generator on property owned by the solid waste generator for the purpose of accepting solid waste from the solid waste generator or waste generated at another facility owned and operated by the generator or wholly-owned subsidiary. After commencement of operation by a solid waste generator of a solid waste disposal facility which is permitted but not included in a solid waste management plan, an amendment to a solid waste management plan shall be required for any solid waste which is to be no longer disposed by the solid waste generator in its own solid waste disposal facility;

(d) An estimate of the area's long-range needs for solid waste management and facilities for five (5), ten (10), and twenty (20) years into the future;

(e) Identification and assessment of current and future solid waste management problems faced by the area. List any deficiencies with existing solid waste management

facilities in meeting current and future area needs, and identify opportunities for improvement;

(f) Outline short-term, mid-term, and long-term goals and objectives of the solid waste management area. The goals and objectives shall be consistent with state policies;

(g) Based on the problems, needs, goals, and objectives previously identified, identify alternative approaches to solid waste management and select the optimal alternatives. Solid waste management activities and facilities to be addressed include:

1. Identification of those regulations and ordinances which provide for proper, safe, and sanitary management of solid waste;

2. A description of proposed improvements to existing solid waste collection and transportation systems;

3. Establishment of a siting procedure and development program to assure the orderly location, development, and financing of new or expanded municipal solid waste management facilities. The plan shall demonstrate how all persons in the planning area will within the near future have reasonable opportunity to dispose of their waste in a manner that complies with state and federal laws;

4. Identification of planned programs for the control and cleanup of litter and open dumps. The programs shall include: a schedule for the cleanup of illegal open dump sites which will result in the cleanup of those sites within one (1) year of cabinet approval of the plan; an annual survey of the county to discover new sites which shall then be scheduled for cleanup within one (1) year; and measures to prevent the recurrence of dumping at sites which are cleaned up;

5. An assessment of opportunities to reduce the need for land disposal by banning grass clippings, leaves, and other yard wastes from municipal solid waste disposal facilities and the institution of composting operations for grass clippings, leaves, and other yard wastes;

6. Establishment of a plan to reduce the need for land disposal through waste reduction and recycling, materials recovery, and energy recovery and the provision of opportunities for recycling that may include, but are not limited to, drop-off centers or door-to-door collection. Where recycling or material recovery is not deemed feasible, specific factual analysis shall be provided to support the conclusion; and

7. A description of any proposed recycling, materials recovery, or energy recovery plan or facility;

(h) A five (5) year schedule and description of activities to be undertaken to implement the proposed plan;

(i) A description of short-term costs of the plan including capital and operational costs on a per ton and per capita basis for each element of the plan, and the identification of the means of financing plan implementation;

(j) Designation of the governing body for implementation of the solid waste management plan or components of the plan. A description of its responsibilities and authority shall be provided;

(k) A description of proposed surveillance and enforcement procedures to assure that solid waste in the planning area is properly managed. Identification of modifications to local laws and regulations necessary to implement the area plan;

(l) Specific provisions to assure that adequate capacity for a ten (10) year period shall be available for municipal solid waste generated in the solid waste management area, and identification of any additional capacity

authorized for disposal of out-of-area municipal solid waste;

(m) Contractual agreements for use of waste disposal capacity at any municipal solid waste disposal facility inside or outside the waste management area identified and relied upon in the plan;

(n) Provisions to assure achievement of reductions in municipal solid waste requiring disposal, consistent with the goals of KRS 224.43-010;

(o) Establishment of a public information and participation process including the following components;

1. Formation of an advisory committee comprised of local residents, and business and industry representatives;
2. Preparation of a draft plan for public notice and comment;
3. Convening of a public hearing upon request; and
4. Publication of a response to public comments.

(2) The solid waste management plan shall consist of two (2) parts. The first part shall contain the information described in subsection (1)(a) through (1)(d) and (1)(1) of this section and shall be submitted to the cabinet by October 1, 1991. The second part shall contain the information described in subsection (1)(a) through (1)(o) of this section and shall be submitted to the cabinet by January 1, 1993. The cabinet shall approve or disapprove the first part of the plan within thirty (30) days of receipt, and the second part of the plan within one hundred twenty (120) days of receipt.

D. THE PROPOSED LANDFILL

In 1991, EKR purchased property in Magoffin County to develop a landfill that would accept 4,000 to 10,000

tons of solid waste per day. In December, 1991, EKR successfully negotiated a contract with the former magistrates of the Magoffin County Fiscal Court for the construction of the landfill, the disposal of Magoffin County's garbage in that landfill, and the disposal of solid waste generated outside of Kentucky. As an inducement, EKR offered to close the County's old substandard landfill, provide royalties to the County, as well as free residential garbage collection and disposal for residents of the County. A modified agreement, which excluded residential garbage collection, was later approved by the magistrates.

In August, 1991, the Magoffin Fiscal Court submitted a solid waste management plan to the Cabinet which contemplated the use of EKR's proposed landfill as the disposal site for waste generated by the County's residents. The Cabinet initially approved the plan, but retraced that approval one month later and requested that the plan be revised. The district court found that the plan was rejected because the Cabinet had identified irregularities in the plan's preparation and submission, including the County's decision to use its existing sub-standard landfill until 1995. EKR, however, maintains that the plan was rejected because of opposition to out-of-state garbage.

In January, 1992, EKR asked the Cabinet to process its landfill application. The Cabinet declined to do so because a local solid plan waste management plan had not yet been approved, as was required by SB 2. The district court found that Magoffin County had not resubmitted a revised local solid waste management plan because of the Fiscal Court's inability to obtain a quorum and because of local resistance to the contract between

EKR and the County. The contract was eventually invalidated in a decision by the Clark Circuit Court, which held that the contract violated the Commonwealth's constitutional requirements of public notice and bidding for franchise agreements.

Because Magoffin County failed to resubmit to the Cabinet a solid waste management plan before the statutory deadline, the Cabinet exercised its authority to write a plan for the County. The Cabinet's plan advocated the use of EKR's proposed landfill as the disposal site for the County's waste, but also noted that due to the uncertainties of the then-pending landfill contract litigation, an alternative should be identified if EKR's proposed landfill was not constructed. The County was also given the choice of developing its own plan if it deemed the Cabinet's plan unacceptable.

By November, 1993, the make-up of the Fiscal Court had changed due to resignations, elections, and the death of the county judge-executive. In March, 1994, the new fiscal court submitted a revised solid waste management plan. The plan did not provide for a landfill in Magoffin County. Instead, the County proposed to market all of its garbage for disposal outside the county planning area. In May, 1994, the Cabinet approved the plan.

E. PROCEEDINGS BEFORE THE DISTRICT COURT

In August of 1994, EKR brought suit in the district court, seeking a declaratory judgment that two provisions of the Commonwealth's waste disposal program--KRS 224.40-315, and KRS 224.43-345--are unconstitutional. EKR also sough to enjoin the Cabinet from enforcing and

applying those provisions, and from implementing various companion regulations.

Both parties moved for partial summary judgment. The Commonwealth also filed a motion to dismiss. The district court granted the Commonwealth's motion for partial summary judgment, and denied EKR's motion, on the grounds that the challenged regulations did not violate the Commerce Clause. EKR appeals to this Court.

II. DISCUSSION

A. STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment. *Johnson v. United States Postal Serv.*, 64 F.3d 233, 235 (6th Cir. 1995). Summary judgment is proper in the absence of genuine issues of material fact. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). We review the district court's findings of fact for clear error. *Downs Mapother & Mapother P.C.*, 103 F.3d 472, 476 (6th Cir. 1996).

B. LEGAL FRAMEWORK

Article I, § 8 cl. 3 of the United States Constitution states in part that "Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States." "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial

burdens on such commerce." *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 82 (1984). This self-executing limitation is often referred to as the "negative" or "dormant" aspect to the Commerce Clause. *Oklahoma Tax Comm'n v. Jefferson Lines Inc.*, 115 S. Ct. 1331, 1335 (1995). Consequently, any state regulation of interstate commerce is subject to scrutiny under the dormant Commerce Clause, unless such regulation has been preempted or expressly authorized by Congress.

The purpose of the Commerce Clause is to prohibit outright economic protectionism or regulatory measures designed to benefit in-state economic actors by burdening out-of-state actors. *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). It forbids states from "advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *H.P. Hood & Sons Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). In order to ferret out this illicit motive, we are instructed by the Supreme Court to engage in a two-step inquiry when reviewing state statutes for alleged violations of the dormant Commerce Clause. The first step involves determining whether the statute directly burdens interstate commerce or discriminates against out-of-state interests. Discrimination is defined as the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys. Inc. v. Depart'l of Envtl. Quality of Oregon*, 511 U.S. 93, 99 (1994). A statute can be discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect. *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992). A statute that is found to be discriminatory, is per se invalid, *id.*, unless the state can demonstrate that it is "demonstrably justified by a valid

factor unrelated to economic protectionism." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988).

If the statute is not discriminatory, we must nevertheless proceed to the second step. In that case, the statute is valid unless the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Having established the legal framework within which this issue must be resolved, we now determine if the challenged provisions of SB 2 offend the requirements of the Commerce Clause.

C. THE EKR CHALLENGE

As we mentioned *supra*, in order for the challenged provisions of SB 2 to be valid, they must not be discriminatory, and they must survive the *Pike* balancing test. EKR argues that the challenged portions of SB 2 are facially, purposefully, and effectually discriminatory, because they were enacted as regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.

1. FACIAL DISCRIMINATION

We first address the contention that KRS 224.40-315 and KRS 224.43-345 are facially discriminatory. State laws that discriminate on their face against interstate commerce are presumptively invalid. *Oregon Waste Sys. Inc. v. Dep't of Evntl. Quality of Ore.*, 511 U.S. 93, 99-100 (1994). This is because these laws are almost always reflective of a state's attempt to isolate itself from the national economy and to protect local economic actors.

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 361 (1992).

In *Fort Gratiot*, the Supreme Court held that an amendment to the State of Michigan solid waste program, which facially prohibited landfill developers in Michigan from accepting out-of-state waste, was unconstitutional. *Id.* at 356-59. The provision stated that: "A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . is explicitly authorized in the approved county solid waste management plan." *Id.* at 357. The Court held that the distinction, which burdened out-of-state economic interests in favor of in-state interests, evidenced Michigan's attempt to isolate itself from the national economy, and to protect local waste producers from competition from out-of-state producers of waste. *Id.*, at 361; *see also Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978); *Oregon Waste Sys.*, 511 U.S. at 96 (invalidating an Oregon law on dormant Commerce Clause grounds, which imposed a fee on "every person who disposes of solid waste generated out-of-state"); *Chemical Waste Management v. Hunt*, 504 U.S. 334, 341 (1992); *Environmental Technology Council v. Sierra Club*, 98 F.3d 774, 785-86 (4th Cir. 1996) (holding a South Carolina law which establishes different quotas for out-of-state and in-state waste facially unconstitutional).

In the instant case, EKR argues that the following provision is facially discriminatory. In KRS 224.43-345 (1)(1), the legislature stated:

> (1) Each area solid waste management plan shall be prepared in accordance with administrative

> regulations to be adopted by the cabinet and shall be required to include the following:
>
> . . . .
>
> (1) Specific provisions to assure that adequate capacity for a ten (10) year period shall be available for municipal solid waste generated in the solid waste management area, and identification of any additional capacity authorized for disposal of out-of-area municipal solid waste.

We disagree with EKR's contention. Although it could be argued that the requirement that local solid waste management plans identify additional capacity for disposal of out-of-area[2] municipal waste is a distinction, it is not a discriminatory distinction. As we noted *supra*, discrimination, for the purpose of the dormant Commerce Clause, is the "different treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys. Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93 (1994).

In *Fort Gratiot*, the distinction made by Michigan clearly burdened out-of-state interests because Michigan denied out-of-state actors access to its solid waste market. The distinction also clearly benefitted in-state interests because it provided "local waste producers complete protection from competition from out-of-state waste producers." *Fort Gratiot*, 504 U.S. at 361. In this case, assuming arguendo that a distinction is being made

---

[2]Although the statute uses the phrase "out-of-area" and not "out-of-state," for our purposes that is a distinction without a difference. The Supreme Court has held that if a statute burdens interstate commerce, the state "cannot avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Fort Gratiot*, 504 U.S. at 361.

between in-state capacity and out-of-state capacity, it cannot be credibly argued that the latter is being burdened. Moreover, it certainly cannot be credibly argued that this facial distinction evidences an attempt by the Commonwealth to isolate local economic actors from interstate competition.[3] Because the statutes are not facially discriminatory, we cannot hold that the challenged provisions are constitutionally infirm on that ground.

2. PURPOSEFUL DISCRIMINATION

EKR also argues that the challenged provisions purposefully discriminate against out-of-state commerce. It is axiomatic that a state law that purposefully discriminates against out-of-state interests is unconstitutional. *Chemical Waste Management Inc. v. Hunt*, 504 U.S. 334, 344 & n.6 (1992); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 & n.15 (1980). The party challenging the validity of the regulation has the burden of demonstrating that the regulation has a discriminatory purpose. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plan meaning." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966); *see also Clover Leaf Creamery Co.*, 449 U.S. at 463, 471 & nn. 7, 15 (holding that a state statute does not violate the dormant Commerce Clause because the articulated legislative objectives, which are

---

[3]One can easily surmise at least one plausible justification for this distinction. Given that the Commonwealth's waste management plan permits local planning areas to dispose of waste outside of the planning area, this provision is most likely intended to identify areas with the capacity to accept solid waste. Thus, contrary to EKR's contention, this provision, instead of hindering commerce, may serve to better facilitate both intra- and interstate commerce.

the actual purposes of the statute, are not discriminatory). *But see Environmental Technology Council v. Sierra Club*, 98 F.3d 774, 785-86 & n.18 (4th Cir. 1996) (holding unconstitutional a state's statute which stated as its purpose to "give preference to hazardous waste generators within" the state); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595-96 (7th Cir. 1995) (holding Illinois statute which required all coal utilities operating in Illinois to acquire scrubbers "to enable them to continue to burn Illinois coal," as violating the Commerce Clause because stated purpose of statute is "to maintain and preserve. . . the mining of coal in Illinois").

The stated purpose of the Commonwealth's waste disposal program is "to provide for the management of solid waste, including reduction, collection, transportation, and disposal in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment." KRS 224.43-010. As can be readily observed, the purpose of the Commonwealth's waste management program is not to protect local economic actors or to economically isolate the Commonwealth from the rest of the nation.

Admittedly, where other sources, other than the state's own self-serving statement of it legislative intent, indicate the presence of actual and discriminatory purposes, a state's discriminatory purpose can be ascertained from sources. *Chambers Medical Technologies of South Carolina, Inc. v. Bryant*, 52 F.3d 1252, 1259 & n.10 (4th Cir. 1995). However, "[w]here discrimination is not patent on the fact of a statute, the party challenging its constitutionality has a more difficult task." *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 423 & n.12 (1994) (Souter, J., dissenting). An apt illustration is provided by *SDDS Inc., v. State of South Dakota*, 47 F.3d 263 (8th Cir. 1994).

In *SDDS*, the Eighth Circuit held unconstitutional a South Dakota initiative and referendum on the grounds that they evidenced a discriminatory purpose. There were three pieces of evidence that led that court to its conclusion. First, the court noted that South Dakota changed its political process to make it more difficult for the solid waste disposer to acquire the necessary permit to operate a solid waste disposal facility. *Id.* at 268. Second, in a pamphlet, which served as a voter guide and accompanied the referendum, South Dakota "exhorted voters to vote against the out-of-state dump because South Dakota is not the nation's dumping grounds." *Id.* (internal quotation marks omitted). Third, the court remarked that the fact that the means chosen by South Dakota to effectuate its stated goals were ineffectual, provided further evidence of that State's discriminatory purpose. *Id.* at 268-69.

Unfortunately, EKR does not present any such evidence to support its contention that KRS 224.40-315 and KRS 224.43-345 were enacted by the Commonwealth with the purpose of protecting local economic actors from interstate competition. EKR, however, contends that a study on solid waste conducted by the University of Kentucky, which was allegedly requested by then-Governor Wilkinson, is indicative of the Commonwealth's discriminatory motives. Assuming we agree with EKR's assertion that one of the study's principal concerns was how to slow down or prevent the entry of out-of-state garbage into the Commonwealth, EKR still fails to demonstrate that the challenged provisions were purposefully discriminatory. EKR does not present any evidence to show that the study impacted the legislature, how the study impacted the legislature, or how the study led to the passage of -- or even influenced -- the challenged provisions. When a party seeks to present circumstantial evidence of discriminatory purpose pursuant to a dormant Commerce Clause challenge, it is the duty of that party to show the effect of that evidence on the challenged statute.

See, e.g., Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 351-53 (1977). In this case, EKR has failed to carry its burden. It has failed to present any evidence which demonstrates that the challenged provisions have a discriminatory purpose. *See Gary D. Peake Excavating, Inc. v. Town Bd. of the Town of Hancock*, 93 F.3d 68, 74 (2nd Cir. 1996) (accord). Consequently, we cannot rule in favor of EKR on that ground.

3. DISCRIMINATORY EFFECT

Even though we do not find that the challenged provisions are either facially or purposefully discriminatory, EKR can nevertheless prevail if it can prove that the challenged provisions have a discriminatory effect. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-579 (1986). A statute which has a discriminatory effect, for Commerce Clause purposes, is a statute which favors in-state economic interests while burdening out-of-state interests. *See id.* at 579 (holding that a statute is discriminatory when its "effect is to favor in-state economic interests over out-of-state interests"). Thus, there are two complementary components to a claim that a statute has a discriminatory effect on interstate commerce: the claimant must show both how local economic actors are favored by the legislation, and how out-of-state actors are burdened by the legislation.

For example, in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), the Supreme Court struck down a North Carolina statute which required, inter alia, "all closed containers of apples sold, offered for sale, or shipped into the State to bear no grade other than the applicable U.S. grade or standard." *Id.* at 335. The statute was challenged by an association composed of apple growers from Washington state whose purpose it was to advertised Washington-produced apples.

Id. at 336-37. The plaintiffs argued that the statute was unconstitutional because of its discriminatory impact on Washington State's apple producers. They maintained that because Washington State-graded apples are recognized by the industry as superior to all other grades, including those of the United States Department of Agriculture, Washington State apple growers will lose the competitive edge that a Washington State grade confers, while at the same time North Carolina's apple growers will be protected from an extremely powerful competitor. They also argued that complying with the North Carolina statute would be extremely costly and inefficient.

The Court agreed. First, the Court explained how the statute burdened out-of-state economic actors. The Court stated that the "first, and most obvious [effect] is the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected." *Id.* at 351. Second, the Court demonstrated how the statute benefitted the local economic actors. The Court noted that

> the statute also had the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system [which]. . . has gained nationwide acceptance in the apple trade . . . .[B]y prohibiting Washington growers and dealers from marketing apples under their State's grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers. . . . Such 'downgrading' offers the North Carolina apple industry the very sort of protection against competing out-of-state

products that the Commerce Clause was designed to prohibit.

Id. at 351-52

In the instant case, EKR does not demonstrate how local economic actors are favored at the expense of out-of-state economic actors. It maintains that because local planning areas are not required to provide for a landfill in their areas, a "local Area can forever impede[] the development of a landfill proposing to accept out-of-state waste." At oral argument, EKR maintained that the County violated the Commerce Clause because it did not provide for a landfill in Magoffin County in its area plan.

Inasmuch as EKR argues that the Commerce Clause required Magoffin County to build a landfill within the County, we emphatically reject that argument.[4] The Commerce Clause is not a safety valve for those who are simply political process losers. As we fully explained, *supra*, unless there is evidence that a state law treats in-state economic interests differently than out-of-state economic interests, that law is valid under the Commerce Clause. Because EKR has failed to make such a showing, we cannot find in their favor.

Additionally, the facts in this case belie EKR's contention that Magoffin County's reason for not adopting EKR's proposed landfill into its area plan is because EKR planned to accept out-

---

[4]EKR's reliance on *GSW Inc., v. Long County, Georgia*, 999 F.2d 1508 (11th Cir. 1993) is unavailing. In *GSW*, the defendant-county admitted that it sought to restrict out-of county waste. *Id.* at 1517. The issue in that case was whether the county's discriminatory actions were justified for reasons other than economic protectionism. This case is clearly distinguishable from *GSW* because we have not found that the Commonwealth discriminated against out-of-state waste.

of-state garbage at the proposed landfill. As EKR itself admits, in 1991 the Magoffin County Fiscal Court negotiated a contract with EKR in which EKR agreed to construct a landfill that would dispose of the County's waste, as well as accept out-of-state waste. Thus, even though the County knew that EKR planned to accept out-of-state waste, the County nevertheless agreed to EKR's proposed landfill. Moreover, when the first area plan was submitted to the Cabinet, EKR's proposed landfill was included in the plan. When the Cabinet rejected the County's area plan and rewrote a plan for the County, the Cabinet itself suggested that the County use EKR's proposed landfill. However, the contract between EKR and the County was later declared invalid, the composition of the Fiscal Court changed, and the new members decided to do the expedient and not build a landfill at all in Magoffin County. These events were most likely the predominant, if not only reasons, why EKR did not succeed. Consequently, EKR has failed to show that the County or the Commonwealth acted in a manner that evidences economic protectionism, or that the actions of the State benefitted local economic actors at EKR's expense, or that of other of out-of-state economic actors.

Further evidence which undermines EKR's contention were noted by the district court. The district court found that the amount of out-of-state garbage imported into the Commonwealth nearly doubled from July 1, 1993 to July 1, 1994, rising from approximately 97,000 tons to approximately 193,000 tons, while the number of landfills in the Commonwealth decreased from 70 in 1991, to 30 on June 30, 1992. Additionally, over the next ten years, the Commonwealth is projecting a total waste disposal capacity of 99 million tons. The Commonwealth is expecting to generate 49 million tons of waste over that same period of time. Thus, over 49 million tons are reserved for out-of-sate waste, which will flow into the Commonwealth over the next ten years.

Thus, we are unable to find that the challenged provisions have a discriminatory effect on interstate commerce.

4. THE PIKE BALANCING TEST

Even though we do not find that the challenged provisions directly burden interstate commerce or discriminate against out-of-state interests, we must nevertheless determine whether their potential benefits outweigh the burdens that they place on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As the Court stated in *Pike*, "Where [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. The party challenging the statute bears the burden of proving that the burdens placed on interstate commerce outweigh the benefits that accrue to intrastate commerce. *USA Recycling, Inc., v. Town of Babylon* 66 F.3d 1272, 1282 (2nd Cir. 1995). Having determined that the challenged provisions regulate evenhandedly--that is, that they are not discriminatory--we must now determine if the Commonwealth's interests are legitimate, and if the benefits of the challenged provisions outweigh the burdens, if any, that are placed on interstate commerce.

The Commonwealth's stated interests in promulgating this waste disposal program are to "provide for the management of solid waste, including reduction, collection, transportation, and disposal in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of [the] environment." KRS 224.43-010. The interests asserted by the Commonwealth are clearly related to the health and welfare of its residents. Legislation which pertains to the

public health and welfare has been consistently recognized as being important and legitimate. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 360 (1992); *Pike*, 397 U.S. at 143.

From the facts presented in this case, it is not clear if the challenged provisions place any incidental burdens on interstate commerce. As noted *supra*, both the County and the Cabinet proposed to use the services of a landfill developer--e.g., EKR--which clearly stated *ex ante*, that it planned to accept out-of-state waste at its proposed landfill. The Cabinet did not appear to believe that the challenged provisions prohibited the acceptance of out-of-state waste into the Commonwealth. There is no evidence in the record that the Cabinet objected to the fact that EKR planned to accept out-of-state waste. EKR does not state what, if any, incidental burdens the Commonwealth's waste disposal program places on interstate commerce. Consequently, based upon the record before us, we find that the Commonwealth's clearly legitimate goals outweigh the burdens, if any, that are placed upon interstate commerce.

III. CONCLUSION

Because the challenged statutes are not facially or purposefully discriminatory, because they do not have a discriminatory effect and because we find that the Commonwealth's stated goals outweigh any burdens on interstate commerce, we **AFFIRM** the decision of the District Court Judge Joseph M. Hood granting the Commonwealth's motion for summary judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

CIVIL ACTION NO. 94-62

EASTERN KENTUCKY RESOURCES, et al. **PLAINTIFFS**

v. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PARTIAL SUMMARY JUDGMENT

THE FISCAL COURT OF MAGOFFIN COUNTY, KENTUCKY, et al. **DEFENDANTS**

Having heard the arguments of counsel and considered the written submissions, the Court makes the following findings of fact and conclusions of law in support of its announced decision to grant the defendants' motion for summary judgment on Count I of the plaintiffs' complaint.

ISSUE PRESENTED

1. The issue presented in this action is whether Kentucky's solid waste management program violates the Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3 ("the Commerce Clause"), by linking municipal solid waste disposal permits to local planning efforts. The plaintiff Eastern Kentucky Resources (EK Resources) maintains that this program constitutes economic protectionism favoring local municipal solid waste (garbage) by discriminating against garbage generated butside [sic] the planning area. The defendants

maintain that the program constitutes the evenhanded treatment of garbage regardless of its origin, furthering the legitimate local goal of reducing the amount of garbage generated per person and thereby slowing the flow of all garbage into landfills.

PARTIES TO THIS ACTION

2. The plaintiff EK Resources is a Florida partnership comprised of two Kentucky corporations, Blue Ash Development, Inc. and Royalton Resources, Inc. (collectively "EK Resources"). EK Resources seeks to construct a new landfill in Magoffin County, Kentucky for the disposal of garbage.

3. The defendant Fiscal Court of Magoffin County is the governing body for Magoffin County, Kentucky. EK Resources also names as defendants the judge executive and the magistrates of the Magoffin County Fiscal Court. They are named in their official capacities. The Magoffin County Fiscal Court and its magistrates (collectively "the Magoffin County Fiscal Court") are charged with certain solid waste planning responsibilities, including the collection and disposal of garbage.

4. The defendant Brereton C. Jones is Governor of Kentucky, and the defendant Phillip J. Shepherd is Secretary of the Natural Resources and Environmental Protection Cabinet (together "the Commonwealth"). They are charged with the duty to administer Kentucky's solid waste management program as enacted by the Kentucky General Assembly. They are named in their official capacities.

5. The defendant Chris Gorman is Attorney General of Kentucky ("the Attorney General"), charged with the duty to defend the constitutionality of Kentucky's duly enacted statutes. He is named in his official capacity.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and U.S.C. §§ 2201, *et seq.* Venue exists in this judicial district pursuant to 28 U.S.C. § 1391.

STANDARD FOR ENTERING SUMMARY JUDGMENT

7. All parties to this action have moved for summary judgment.

8. In support of its motion, EK Resources relies upon the affirmins of its Verified Complaint and upon exhibits appended to its Complaint and to its Motion for Summary Judment and support Memorandum. Those exhibits include selected local solid waste management plans and contracts. A 1990 University of Kentucky study of solid waste problems, and documents relating to EK Resources' efforts and constructing the new landfill in Magoffin County. See Exhibits A-F to the Verified Complaint (hereinafter EKR's Complaint); Exhibits 1-33 of EK Resources' Motion for Partial Summary Judgment (hereinafter EKR's Motion); and Exhibits 1-7 of their Joint Response To The Motions For Summary Judgment filed by the Defendants (hereinafter EKR's Joint Response).

9. The Commonwealth relies upon 8 exhibits appended to its Motion for Summary Judgment and supporting Memorandum:

a. Exhibit 1, Affidavit if Vicki Pettus, Manager of the Resource Conservation and Local Assistance Branch, Division of Waste Management, Natural Resources and Environmental Protection Cabinet;

b. Exhibit 2, Affidavirt of Joy Morgan, Supervisor of the Local Planning and Assistance Section, Resource Conservation and Local Assistance Branch Division of Waste Management, Natural Resources and Environmental Protection Cabinet;

c. Exhibit 3, Affidavit of George Gilbert, Manager of the Solid Waste Branch, Division of Waste Management, Natural Resources and Environmental Protection Cabinet;

d. Exhibit 4, Affidavit of Caroline P. Haight, Director of the Division of Waste Management, Natural Resources and Environmental Protection Cabinet;

e. Exhibit 5, Ky. Acts 1991 Chapter 12 (Senate Bill 2);

f. Exhibit 6, Document incorporated by reference in 401 KAR 49:011 and entitled "Guidelines for Preparation of Area Solid Waste Management Plan";

g. Exhibit 7, Landfill contract between EK Resources and Magoffin County Fiscal Court; entitled "Operating Permit Agreement"; and

h. Exhibit 8, KRS 224.40-315 and 224.43-345.

10. The Magoffin County Fiscal County and the Attorney General do not offer additional evidence into the record.

11. The parties agree that this action is ripe for summary judgment on the issue presented, and that no genuine issues of material fact exist.

12. Summary judgment under Fed.R.Civ.P. 56 may be entered despite the existence of complex facts, as long as there are no genuine issues of material fact; materiality is governed by the substantive law of the case, which in this case is the authority interpreting the Commerce Clause. *Matsushita Electric Industrial Co., Ltd. et al. v. Zenith Radio Corp. et al.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Celotex Corp. et al. v. Catrett et al.*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson et al. v. Liberty Lobby, Inc. et al.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

FACTS PRESENTED IN THIS ACTION
Kentucky's Solid Waste Program

13. The Commonwealth submits with its memorandum in support of its motion for summary judgment the affidavits of four waste management officials employed by the Natural Resources and Environmental Protection Cabinet (hereinafter the Cabinet). Affiant Caroline P. Haight is director of the Cabinet's Division of Waste Management and is a professional engineer with 22 years experience in the field of waste management. Commonwealth's Exhibit 4. The Division of Waste Management administers the waste management responsibilities of the Cabinet, including issuance of landfill permits, publication of a state solid waste management plan, and review of local solid waste management plans. *See generally,* KRS Chapter 224.40, 224.43. Affiant George Gilbert is also a professional engineer and manager of the Division of Waste Management's solid waste permits branch. Commonwealth's Exhibit 3. The permits branch issues landfill permits. Affiant Vicki Pettus is manager of the division's planning branch, which

coordinates state and local solid waste planning activities. Commonwealth's Exhibit 1. Affiant Joy Morgan is the supervisor in charge of assisting local government in preparing their local plans and reviewing the local plans. Commonwealth's Exhibit 2. These affidavits, and the other exhibits submitted by the Commonwealth establish the following facts, which are not rebutted by EK Resources.

14. Kentucky has had a solid waste program since the 1960's. The early emphasis was on the control of open dumps and disease vectors present at disposal sites. Collection of garbage remained a local responsibility, and poor collection practices had resulted in continued open dumping, with the accompanying environmental hazards. There was no emphasis on collecting the garbage, or on reducing the amount of garbage generated per person in order to slow the flow of garbage into disposal sites. Kentucky's program did include local planning as a component but planning was not emphasized, had not proven effective, and was not linked to the issuance of landfill permits. Commonwealth's Exhibit 4.

15. In the course of administering Kentucky's solid waste program, the Cabinet found that solid waste has hazardous substances in it and that Superfund sites are often old local garbage dumps requiring clean-up from responsible persons, including local communities using those old disposal sites. Commonwealth's Exhibit 4.

16[.] In 1988 the Cabinet conducted a comprehensive evaluation of groundwater monitoring results at solid waste landfills. Those tests showed that the landfills were leaking hazardous substances into groundwater. At the same time, the U. S. Environmental Protection Agency was proposing new national design standards for solid waste landfills. 53 Fed. Reg. 33314 (August 30, 1988). The Cabinet adopted new regulations

in May 1990 consistent with those proposed federal regulations and incorporating more stringent design standards for solid waste landfills, with the stated purpose of improving groundwater protection. *See*, 401 KAR Chapters 47, 48 (1990); Commonwealth's Exhibits 3, 4.

17. The new design standards were phased in; this was necessary to assure that existing landfills could continue operating until new landfills meeting the more stringent 1990 design standards could be permitted and constructed. However, it also meant that landfill operators started filling up the existing landfills to beat the deadline for their phase-out (June 1992), and the Cabinet feared there would be no landfill space left for Kentucky garbage, with the resulting possibility that garbage would be generated without a place to dispose of it. *See*, 401 KAR 47:080 Section 4; Commonwealth's Exhibits 3, 4.

18. At the same time the landfill design issues were under public discussion, citizens were also complaining to state and local elected officials about the rapid rate at which landfills were filling up, and about the importation of out-of-state garbage. Commonwealth's Exhibit 4.

19. These events led to the convening of the 1991 Extraordinary Session of the Kentucky General Assembly, and the enactment of Senate Bill 2 ("SB 2"), Ky. Acts 1991, Chapter 12, on February 21, 1991. Commonwealth's Exhibit 5.

20. In anticipation of the special legislative session, the Cabinet adopted temporary emergency regulations to hold the status quo. Those regulations imposed a moratorium on permits for all new and expanding landfills, capped increases in amounts of garbage disposed, with in-state and out-of-state garbage treated identically, and authorized the diversion of garbage from landfills phasing out their operation to other landfills through a

minor permit modification. *See*, 401 KAR 47:132E, 47:134E, 47:136E (October, 1990); Commonwealth's Exhibit 4.

21. SB 2 contained sixty-three sections addressing a variety of solid waste-related subjects, including garbage reduction strategies, issuance of landfill permits, state and local solid waste planning, garbage collection, tax incentives for recycling, and public participation in local solid waste planning. Commonwealth of Kentucky's Exhibit 5. There are three basic components to SB 2:

a. KRS 224.43-315 (formerly KRS 224.837) requires local governments to offer "universal" garbage collection to reduce illegal dumping;

b. KRS 224.43-010 (formerly KRS 224.857) establishes a 25% per capita reduction goal, to minimize the amount of garbage generated per person and thereby to slow the flow of garbage into landfills; and

c. KRS 224.43-345(1) (formerly KRS 224.888(1)) imposes on local governments fifteen planning duties, including the duty to project local garbage disposal needs and to plan for those needs by finding present and future "homes" for garbage, by a date certain and with supporting documentation.

22. To implement the goals of SB 2, local governments were charged with the duty to collaborate and to establish local solid waste planning areas. KRS 224.43-340 (formerly KRS 224.887). This type of comprehensive local planning, including projections on garbage generation and disposal needs, are mandated by the federal Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6942-6948.

23[.] Once the local planning areas were established, the governing body of each planning area was to develop a solid waste management plan for the area under its jurisdiction. The plans were to, *inter alia*, identify current garbage disposal needs, make arrangements for universal garbage collection, provide for clean-up of old dumps, begin garbage reduction strategies, project future disposal needs, and locate a disposal site or "home" for garbage generated within the planning area. KRS 224.43-345(1)(1) (formerly KRS 224.888(1)(10)). Failure to submit a plan authorized the Cabinet to prepare a plan for that planning area. KRS 224.340(10) (formerly KRS 224.887(1)).

24. The local plans were to be submitted to the Cabinet for approval in two parts, the first due in October, 1991, eight months after enactment of SB 2, and second due January 1, 1993. KRS 224.43-345(2) (formerly KRS 224.888(2)). Because of the short deadline for the first part of the local plans, the Cabinet did not adopt regulations offering guidance on complying with the statute. The Cabinet was working on regulations for Part 2 of the local plans when the *Fort Gratiot* case was decided by the U. S. Supreme Court. *See, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992). The Cabinet decided to adopt a regulation stating that local plans under Section (1)(1) of KRS 224.43-345 could only identify a total cap on the capacity for garbage offered in "host" landfills (landfills located within the planning area).[1] Planning areas were not to distinguish between garbage generated locally, and that generated outside the planning area and disposed within it. 401 KAR 49:011; Commonwealth's Exhibits 4, 6[.]

---

[1] The total cap on garbage established under KRS 224.43-345(1)(1) and the 401 KAR 49:011, Section 1 guidelines only applies to municipal solid waste. Industrial waste disposal is not included in the disposal cap.

25. Thus, local planning areas had a duty to assure adequate disposal capacity for local garbage; that is, to find a home for the garbage generated within the planning area. That duty could be discharged by hosting a landfill within the planning area or by marketing local garbage for disposal outside the planning area. The Michigan program stuck down by *Fort Gratiot, supra* allowed local planning areas to ban garbage from outside the planning area unless expressly approved in the local plan, thus assuring capacity for local needs. By contrast, the Kentucky program contains no ban on garbage from outside local planning areas. Under the Kentucky program, local governments must assure capacity for the garbage generated within their jurisdiction, but unlike the Michigan program the Kentucky program does not authorize local governments to *reserve* capacity for local garbage in a local landfill by restricting opportunities for garbage outside the planning area. In Kentucky, planning areas hosting landfills may only establish a source-neutral cap on the total amount of garbage to be accepted. The Kentucky program requires planning areas to market their garbage, either by offering to host a landfill, in which case garbage from outside the planning area is accepted, or by offering to "sell" their garbage for disposal elsewhere. Commonwealth's Exhibit 4 and Exhibit 1.

26. SB 2 also established a new condition for issuance of landfill permits, related to local solid waste planning and not to design standards. Before submitting an application for a new landfill or a substantial expansion of an existing landfill to the Cabinet, a landfill developer must request the governing body of the local planning area to review the request to determine if it is consistent with the local solid waste management plan. KRS 224.40-315 (formerly KRS 224.856). This requirement, unlike the Michigan statute, applies to all applications for new and substantial expansion of existing landfills, regardless of the origin of the garbage to be disposed.

27. SB 2 links the issuance of landfill permits to local solid waste management plans with the goal of requiring government officials, local citizens and landfill developers to work together on garbage-related issues, with the long range goal of reducing the amount of garbage generated per capita and thus slowing the flow of garbage into landfills. *See*, KRS 224.43-010.

28. The exhibits of the Commonwealth demonstrate that SB 2 is designed to further the following legitimate local interests:

a. Requiring local governments to provide comprehensive garbage collection, which will protect the environment from open dumping;

b. Achieving the local long-term responsible management of garbage by requiring local governments to project local disposal needs and to "find a home" for locally-generated garbage;

c. Requiring identification of how much garbage is generated and where it is going, so that the Cabinet can assure that homes have been found for Kentucky garbage, either within or outside Kentucky;

d. Allowing the Cabinet to match types and sources of garbage to locations identified in issued permits, to be sure that the homes planned are actually permitted, and to develop waste reduction strategies based on the types of garbage generated in specific locations;

e. Allowing the Cabinet to work with local planning areas on "source separation", in which recyclable wastes must be removed from the stream of garbage and sent for recycling; and

f. Fostering an economic climate which promotes the development of new technologies designed to provide markets for materials separated from garbage cans, and to establish new markets for other recyclable materials.

g. Allowing the Cabinet to identify how to slow the flow of garbage into landfills by using locally-generated planning data to start designing reduction strategies; and

h. Promoting public participation in developing waste management strategies. *See generally*, Commonwealth's Exhibits 1-4; SB 2; 401 KAR 49:011.

29. SB 2 has had the following practical effects from its enactment in February 1991 to the submission of the exhibits in October 1994;

a. The Cabinet has provided informational and technical assistance to local governments during development of the local plans, met with local officials and interested citizens in every county, and worked with them on correcting deficiencies;

b. Kentucky has 118 local plans; every local planning area submitted to the Cabinet an approvable plan by the statutory deadline but Magoffin County;

c. Thirty-six local solid waste management plans provide for hosting a landfill or landfills; 34 have total capacity authorization for the next ten years greater than in-area needs, with the exceptions of Scott County, which owns its landfill and operates as a market participant, and Graves County, in which the landfill is closed due to the environmental crime conviction of its operator;

d. The remaining 82 solid waste planning areas will not host a landfill and instead will market their garbage for sale outside the planning area;

e. Five counties have amended their plans to increase capacity at an existing landfill or to add new landfills;

f. The amount of garbage imported to Kentucky from out-of-state nearly doubled from July 1, 1993 to July 1, 1994, from approximately 97,000 tons to approximately 193,000 tons, while the number of landfills in Kentucky dropped from about 70 in 1991 to 30 on June 30, 1992;

g. The total disposal capacity authorized in local solid waste plans is approximately 99 million tons over the next ten years, with Kentucky projected to generate 50% of this and the remainder of the authorized capacity going to out-of-state garbage;

h. Sixty local determinations have been made; only two applications were rejected as inconsistent, and one of those was returned by the Cabinet for more work;

i. Counties must close out old dumps under SB 2 as part o f their plans; 1/3 of those approximately 3700 identified have been closed;

j. In 1990, 104 of 120 counties reported no recycling programs existed within the planning area; in 1993 the local plans showed that only 26 of 120 counties do not have recycling programs;

k. In 1990 only 32 counties had documentation on garbage collection rates; today 97 counties have that data, and all

120 counties are implementing a form of universal collection; and

l. SB 2 significantly strengthened public involvement; 120 counties have citizen advisory committees and 75 have solid waste coordinators. Commonwealth's Exhibits 1 and 2.

30. EK Resources submits two statements attributed to Governor Jones and to Magoffin County Judge-Executive Charles Hardin opposing the importation of out-of-state garbage to EK Resources' proposed landfill, arguing that these statements demonstrate a discriminatory motive behind SB 2. See Exhibit 6 to EKR's Joint Response. Neither Governor Jones nor Judge Hardin is alleged to have participated in the enactment of SB 2 or in its implementation by the Cabinet. The Commonwealth does not dispute the statements made by these elected officials, acknowledging that out-of-state garbage is unpopular with the public, and therefore with elected officials. But the Commonwealth demonstrates by its undisputed exhibits that garbage is moving freely into and out of Kentucky, and that Kentucky has been evenhanded in its treatment of all garbage, regardless of origin.

31. While EK Resources does not dispute the figures on the importation of garbage into Kentucky established by the Commonwealth through its affidavits, it argues that the amount of garbage imported to Kentucky from out-of-state has dropped significantly from the historical high of approximately 662,000 tons occurring in 1989, before adoption of the new landfill design standards and enactment of SB 2. EK Resources relies on the 1990 University of Kentucky solid waste study. See Exhibit 3 of EKR's joint response. The Commonwealth does not dispute the 1989 figure, arguing instead that the drop in importation of out-of-state garbage may be attributed to factors other than the

enactment of SB 2, such as the adoption of the more stringent landfill standards in 1990 and other market conditions. EK Resources admits the existence of a nationwide glut in landfill space in 1993 and 1994. EKR's joint response, p. 56, footnote 19.

32. In further opposition to the Commonwealth's exhibits, EK Resources submits 16 of the 118 local solid waste management plans and host agreements (private contracts entered between landfill developers and local planning areas) appended to those selected plans. Exhibit E of EKR's complaint and Exhibits 19 through 33 of EKR's motion. EK Resources quotes provisions of those contracts setting caps on amounts and sources of garbage to be disposed, arguing that they demonstrate the discriminatory practical effect of SB 2, since the contract conditions are onerous and restrict the importation of garbage. The Commonwealth does not dispute the contents of those contracts, arguing instead that the Cabinet does not review those contracts and that they are negotiated without the Cabinet's regulatory oversight. The Commonwealth cites EK Resources' own host agreement with Magoffin County Fiscal Court (Commonwealth's Exhibit 7) as evidence that EK Resources was prepared to offer the same inducements it criticizes here, and further notes that EK Resources argues to the Kentucky Court of Appeals that host agreements are entered by counties as a proprietary, not governmental function, and therefore are not subject to Ky. Const. § 164.

33. EK Resources also appends as an exhibit a 1987 order entered by the U.S. District Court, Western District of Kentucky holding that the Cabinet had violated the Commerce Clause with respect to the renewal of a solid waste permit. *See* Exhibit F to EKR's complaint. The Commonwealth does not dispute the order, acknowledging the political unpopularity of out-of-state garbage, but argues that the practical effect of SB 2

is unequivocally demonstrated by the figures showing the unimpeded movement of garbage in interstate commerce. Further, the Commonwealth notes that the regulations which were the basis of the order were amended by the May, 1990 regulations setting out the new design standards, and that the statutes authorizing the type of differential treatment invalidated by the order were amended by SB 2 in 1991 to remove that differential treatment. *See*, 401 KAR Chapter 47 (1987) and 401 KAR Chapters 47 and 48 (1990), KRS 224.160 (formerly KRS 224.847) and KRS 224.614 (formerly KRS 224.848), SB 2 §§ 26, 17.

34. The Court finds that the local interests identified by the Commonwealth are legitimate, that SB 2 furthers the legitimate local interests identified by the Commonwealth, that the bill is narrowly tailored to further those interests, and that the practical effect of SB 2 has been the evenhanded treatment of garbage regardless of its origin. The undisputed facts demonstrate that in three and one half years since its enactment, SB 2's practical effect has accomplished the legitimate local interests identified by the Commonwealth in its affidavits. The local plans establish total even-handed caps on landfill's capacity if the area hosts a landfill. There is no local plan in Kentucky authorizing a landfill for disposal of local garbage but banning garbage from outside the planning area.[2] Further, the undisputed facts demonstrate the garbage is moving freely in interstate commerce, both between planning areas and into and out of Kentucky. Finally, the local solid waste plans together authorize 50% of Kentucky's landfill space to the out-of-area or out-of-state garbage market. The additional facts offered by EK Resources are of limited probative value when weighed against the Commonwealth's undisputed facts.

---

[2] *See*, Footnote 3, *infra*.

The Proposed Landfill

35. In 1991, EK Resources purchased land in Magoffin County for the expressed purpose of constructing a new landfill for the disposal of garbage generated in Magoffin County and elsewhere, including locations outside Kentucky. In December, 1991 EK Resources successfully negotiated a contract with the former magistrates of the Magoffin County Fiscal Court for construction of the landfill, the disposal of Magoffin County's garbage in that landfill, and the acceptance of garbage from outside Kentucky. EK Resources offered as an inducement the closure of Magoffin County's old substandard landfill, royalties to Magoffin County, and free residential garbage collection and disposal for residents of Magoffin County. A second, modified agreement which excluded residential garbage collection was approved in April, 1992. See Commonwealth's Exhibit 7.

36. In August 1991, the Magoffin County Fiscal Court submitted a solid waste management plan to the Cabinet which contemplated using EK Resources' planned landfill as the "home" for Magoffin County's garbage. The Cabinet approved the plan, but a month later identified irregularities in its preparation and submittal, including the county's decision to use the existing sub-standard landfill located in Magoffin County until 1995. The Cabinet then disapproved the plan, and requested that it be revised. There is no evidence in the record to suggest that the Cabinet disapproved the local plan due to EK Resources's proposal to accept out-of-state garbage in addition to the Magoffin County's garbage. EK Resources did not appeal the Cabinet's decision to disapprove the plan. See EKR's complaint, paragraphs 33 and 34.

37. In January 1992, EK Resources also asked the Cabinet to process its landfill application. The Cabinet declined

to process the application, as authorized by statute, since the local plan had not been approved, and since the Cabinet could not determine if a local determination had been correctly made. EK Resources did not appeal the Cabinet's decision not to process the application. EKR's motion, Exhibits 2 and 6 and EKR's complaint, paragraph 44.

38. Magoffin County did not submit a revised local solid waste management plan due to the fiscal court's inability to obtain a quorum and local resistance to the proposed landfill. These events culminated in litigation over the validity of the landfill contract and ultimately in a decision by the Clark Circuit Court striking down the contract as violating Ky. Const. § 164, for failing to comply with public notice and bidding requirements for a franchise agreement. The decision of the Clark Circuit Court is on appeal to the Kentucky Court of Appeals, which has not rendered an opinion. Unless reversed by the appellate court, the decision of the Clark Circuit Court means that EK Resources does not have an enforceable contract with the Magoffin County Fiscal Court for the construction of the landfill. EKR's complaint, paragraphs 52, 63 and 64.

39. Because Magoffin County did not submit to the Cabinet a Part 2 solid waste management plan by the statutory deadline of January 1, 1993, in March, 1993, the Cabinet wrote a plan for the county as it was authorized to do by statute, directing the county to develop its own plan by a date certain or to adopt the Cabinet's plan. The Cabinet's plan was in the nature of an enforcement-based compliance schedule. It allowed Magoffin County to use EK Resources' proposed landfill as the "home" for Magoffin County's garbage, but noted that due to the uncertainties of the pending landfill contract litigation, an alternative should be identified if EK Resources' proposed landfill was not constructed. The Cabinet's plan did not impose restrictions on the sources of the garbage the landfill could

receive. EK Resources did not appeal the Cabinet's decision to write a plan for Magoffin County. EKR's complaint, paragraphs 61 and 62 and Exhibit C.

40. By November, 1993 the make-up of the Magoffin County Fiscal Court had changed, due to resignations, an election and the death of the county judge-executive. In March, 1994 the new fiscal court submitted a revised solid waste management plan. The plan did not provide for a landfill in Magoffin County, instead proposing that Magoffin County market all of its garbage for disposal outside the county planning area. In May 1994 the Cabinet approved the plan. EKR's complaint, paragraphs 57, 65, 67 and 69 and Exhibit E.

41. EK Resources brought this action in August, 1994.

CONCLUSIONS OF LAW

The Commerce Clause

42. The Commerce Clause grants Congress the power to regulate commerce among the several states; this also limits the power of the states to erect barriers against interstate commerce, a doctrine known as the dormant Commerce Clause. But the limit on state power is not absolute; in the absence of conflicting federal legislation, states retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected. Where such legitimate local interests are implicated, defining the appropriate scope for state regulation is often a matter of delicate adjustment. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35-36, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980).

43. Even if a state is regulating a legitimate local interest, it must generally act in a manner consistent with the ultimate principle that one state in its dealing with another may not place itself in a position of economic isolation. However important that local interest may be, it may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is a reason apart from their origin to treat them differently. *Id.*

44. In reviewing state laws under the dormant Commerce Clause, the courts distinguish between outright economic protectionism and more indirect burdens on the free flow of trade. Outright economic protectionism requires a virtually *per se* rule of invalidity. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). Under the *per se* test, a local law will be held to violate the Commerce Clause unless the state can justify both the local benefits flowing from the statute and the absence of any less discriminatory alternatives adequate to preserve the local interests at stake. *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009, 2014, 119 L.Ed.2d 121 (1992). The discrimination must be demonstrably justified by a valid factor unrelated to economic protectionism. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274, 108 S.Ct. 1803, 1808, 100 L.Ed.2d 302 (1988). A statute may be facially discriminatory, discriminatory in practical effect, or discriminatory in purpose. *City of Philadelphia v. New Jersey, supra; Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). Discrimination is differential treatment based on the origin of the article of commerce. *Oregon Waste Systems v. Oregon Department of Environmental Quality*, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). The burden is on the challenger to demonstrate the existence of differential treatment. *Hughes v.*

Oklahoma, 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979).

45. However, a law will be upheld against Commerce Clause challenge if it regulates evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, unless the burden imposed is clearly excessive in relation to putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847 25 L.Ed.2d 174 (1970). If a legitimate local interest is found, then the question is one of degree, and the extent of the burden that will be tolerated will depend on the nature of the local interest and on whether that local interest could be promoted as well with a lesser impact on interstate commerce. *Id.* Legislative objectives need only be credibly advanced to invoke the *Pike* test, as long as there is no patent discrimination against interstate commerce. *City of Philadelphia v. New Jersey*, 98 S.Ct. at 2535. The principal focus of the inquiry is the practical operation of the statute, since the validity of state laws must be judged in terms of their probable effects. *Lewis v. BT investment Managers*, 100 S.Ct. at 2016. A regulatory program may incidentally burden interstate commerce; if there is a countervailing important state interest and the regulation is evenhanded, the burden will be justified unless excessive in relation to the putative local benefits. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473, 101 S.Ct. 715, 728, 66 L.Ed.2d 659 (1981); *Pike, supra.*

EK Resources' Claim of Facial Discrimination

46. EK Resources' first argument in support of its claim that the solid waste planning requirements of SB 2 violate the Commerce Clause is that the statutes are facially discriminatory. EK Resources charges that KRS 224.43-345(1)(1) is facially discriminatory because it states that local planning areas must *assure* capacity for local garbage, while only

authorizing disposal of garbage from outside the planning area. KRS 224.40-315 is alleged to be facially discriminatory by linking issuance of landfill permits to the discriminatory local plans. EK Resources bears a heavy burden in order to establish its claim of facial discrimination; EK Resources must establish that no set of facts exists under which the challenged statutes would be valid. Government Suppliers Consolidating Services, inc. v. Bayh, 975 F.2d 1267, 1283 (7th Cir. 1992), *cert. den.* 113 S.Ct. 977, 122 L.Ed.2d 131 (1993), citing *U.S. v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987).

47. KRS 224.43-345(1)(1) does not on its face allow the local planning areas to ban garbage from outside the planning area or otherwise to reserve capacity in a local landfill for locally-generated garbage. *Cf., Fort Gratiot, supra.* EK Resources charges that reservation is implied by the use of the term "assure" for local garbage and the term "authorize" for foreign garbage. However, the difference in the words "assure" and "authorize" is explained by the fact that local planning areas have police powers only over garbage within their jurisdiction. *See, Government Suppliers consolidating Services, Inc. v. Bayh*, 975 F.2d at 1280. That is, local governments must find a home for their own garbage, either inside or *outside* the planning area; the Commonwealth requires that assurance so that all local planning areas plan responsibly. *See also*, KRS 224.43-345(1)(m), in which the local plan is to identify contractual agreements for garbage disposal inside or outside the planning area, in order to verify the ultimate disposal location; this supports the conclusion that SB 2 contemplated finding a home for local garbage either within or without the planning area, with no reservation of landfill capacity afforded by the statute. The term "authorization", by contrast, applies to the garbage outside of its police power and allows the local area to place a total cap on landfill capacity if the area hosts a landfill. The Court finds

that KRS 224.43-345(l)(l) does not on its face afford preferential treatment for local garbage.

28. KRS 224.40-315, requiring a developer of a new landfill or a substantial expansion of an existing landfill to obtain a local determination from the governing body of the local solid waste planning area in which the landfill will be located, applies on its face to all landfill applications of that type, regardless of the source of garbage to be disposed. EK Resources asserts this requirement unfairly burdens landfill developers who wish to accept out-of-state waste. The Court finds that KRS 224.40-315 does not on its face afford preferential treatment for local garbage, since it applies equally to all permit applications.

EK Resources' Claim of Discrimination in Practical Effect

49. EK Resources next alleges that discrimination against garbage generated outside the planning area exists in practical effect. In support of this allegation EK Resources relies upon selected landfill contracts entered between planning areas hosting landfills and landfill developers and upon selected local plans. EK Resources charges that these "host agreements" impose undue burdens on interstate commerce insofar as they set limits on amounts and sources of garbage to be disposed, and because they offer preferential service to residents of the host planning area. EK Resources also quotes certain phrases from the contracts and the local plans, arguing that they denote a bias against out-of-state garbage. The Commonwealth does not dispute the existence or contents of the selected contracts or plans, but counters that the cumulative practical effect of SB 2 on interstate commerce is presented by its affidavits which include a review of SB2's terms and all 118 local plans.

50. The undisputed facts demonstrate that the practical effect of the local planning required by SB 2 has been

the evenhanded treatment of garbage regardless of origin, because all local plans either ban all landfills and require the sale of local garbage outside the planning area, or they offer disposal capacity for garbage outside the planning area, both from within and outside the planning area.[3]

51. Further, the undisputed facts show that the 118 local plans have effected evenhanded treatment of garbage regardless of origin because Kentucky now has authorized double the landfill capacity needed to serve Kentucky's disposal needs over the next ten years, and that capacity is available for disposal of out-of-state garbage. The amount of out-of-state garbage disposed in Kentucky doubled from 1993 to 1994. While that amount is still lower than the historical high of 1989, there is no evidence in the record to establish that SB 2's planning requirements were the direct cause of the decrease; the Court finds it equally likely that the cause of the decrease was the adoption of the 1990 stringent landfill design standards, the glut of national landfill capacity, or other economic changes in the marketplace.

52. The contracts themselves impose evenhanded caps on landfill size, with identification of the sources of garbage necessary to help identify persons potentially liable as generators of hazardous substances requiring Superfund clean-up. While EK Resources charges that the conditions in the appended contracts are burdensome, it does not negate the evidence presented by the Commonwealth of the evenhanded treatment of garbage. Further, since contracts are negotiated in the

---

[3] The two exceptions are Scott County, a participant in the market authorized to limit its disposal service to its own constituents under the market participant doctrine enunciated in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976), and Graves County, in which the landfill has been closed due to the operator's conviction of an environmental crime.

marketplace without the Cabinet's regulatory oversight their conditions are evidence of the free market at work. While a local planning area may not host a landfill solely for its own needs, it is also not obligated to host a landfill at all, or to do business with a particular landfill developer. This freedome to negotiate is not violative of the Commerce Clause and allows competition between landfill developers to provide services most desirable to the local planning areas. Finally, the remarks attributed to elected officials cited by EK Resources are simply not material to the issue of practical effect, especially when weighed against the undisputed evidence that garbage is treated identically under the local plans, regardless of origin. Any burden on interstate commerce imposed by these private contracts is indirect at best.

53. EK Resources charges that interstate commerce in out-of-state garbage is directly burdened, citing as evidence its failure to site a new landfill in Magoffin County. However, EK Resources' example illustrates a local, personal effect on a *participant* in interstate commerce, not a practical effect on interstate commerce itself. The Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. *Minnesota v. Clover Leaf Creamer*, 101 S.Ct. at 729. Full, unrestricted access to a local market does not establish a direct burden on interstate commerce. *Kleenwell Biohazard Waste and General Ecology Consutlants, Inc.*, 48 F.3d 391 (9th Cir. 1995). The Commerce Clause does not guarantee a profit for every competitor in the marketplace, nor does it mandate construction of a landfill in every county. The undisputed facts establish that Magoffin County's situtation was unique in Kentucky, with the inability to submit an approvable local plan, litigation over the landfill contract, and the alternating support and lack of support of the succeeding fiscal courts.

54. The Court finds that EK Resources has failed to carry it burden of showing discrimination in practical effect. Its

evidence, consisting of facts personel [sic] to its unique political and legal situation in Magoffin County is of limited probative value when weighed against the evidence presented by the Commonwealth, which demonstrates that the overall practical effect of SB 2 is that garbage is moving freely in interstate commerce.

EK Resources' Claim of Discriminatory Purpose

55. EK Resources' third argument is that SB 2's local planning requirements violate the Commerce Clause because SB 2 has a discriminatory purpose. However, EK Resources offers evdience not on purpose but on motive.

56. EK Resources cites the 1990 University of Kentucky study of solid waste problems to support its claim that Kentucky has long had the intent of discriminating against out-of-state garbage. The 1990 solid waste study identified approaches to solid waste management issues in place throughout the country, and suggested various options to address such topics as illegal disposal and universal collection, recycling, landfill design and capacity, and local planning and public participation. The study does not focus on out-of-state garbage, and where the issue is discussed, the duty to comply with the Commerce Clause is noted. The study contained a section on the Commerce Clause, and the duty to comply with the judicial precedents interpreting it, stating: "One key to state actions being able towithstand challenges based on the commerce clause is the application of the same standards to both in-state and out-of-state waste. EKR's joint resonse, Exhibit 3, page 150. The study does not denote an unconstitutional motive on the part of the drafters or upon the Commonwealth, but identifies the constitutional (and other) constraints affecting the management of garbage.

57. EK Resources also relies on the remarks attributed to Governor Jones and Judge-Executive Hardin opposing EK Resources' disposal of out-of-state garbage at the proposed landfill. The Court finds that while out-of-state garbage is frankly admitted by the Commonwealth to be politically unpopular, opinions of elected officials who were not involved in the drafting or implementation of SB 2 are not probative of the issue of motive when weighed against the undisputed fact that garbage is moving freely into and out of Kentucky.

58. EK Resources further cites the U.S. District Court opinion invalidating an earlier permitting effort by the Commonwealth under the Commerce Clause as evidence of imporper motive. However, the Commonwealth amended its regulations in response to that ruling. Further, since the statutes authorizing differential treatment of waste based on origin were amended in SB 2 to remove the differential treatment, the Court finds that it is more likely the Commonwealth removed the offending language to bring the solid waste program into conformance with the Commerce Clause, not to subvert it.

59. The fact that the Cabinet adopted a regulation in response to the *Fort Gratiot* decision construing KRS 224.43-345(1)(1) as requiring a total source-neutral authorization on landfill capacity, and the fact that local plans do not in fact give preferential treatment to local garbage support a finding that the Commonwealth's interest was in implementing the planning requirements in conformance withthe Commerce Clause, not in subverting its requirements.

60. The Court finds that EK Resources did not submit adequate evidence to support a finding of discriminatory motive or purpose. Without evidence of facial discrimination or discrimination in practical effect, evidence of motive is of

limited probative value. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 97 S.Ct. at 2445; *Government Suppliers*, 975 F.2d at 1278-9.

Application of the Pike Test to EK Resources' Claims

61. Because EK Resources does not carry its burden of establishing the existence of discrimination against garbage from outside local planning areas either by differential treatment on the face of the statutes challenged, in practical effect, or in purpose, the balancing test identified in *Pike v. Bruce Church, supra* should be used.

62. Using the *Pike* test, the Court finds that the Commonwealth has carried its burden of establishing that SB 2 furthers legitimate local goals, including the goal of reducing the amount of garbage generated per person and thereby slowing the flow of all garbage into landfills. Slowing the flow of garbage into landfills has specifically been upheld as a legitimate local goal, as has solid waste planning. *See, Fort Gratiot, supra; City of Phildelphia, supra.*

63. The Court further finds that these goals are implemented for local and foreign garbage in an evenhanded manner. Every landfill developer must get a local determination, regardless of the source of the garbage; local garbage is not favored. Further, all local plans must establish a home for garbage generated within the planning area, but local garbage is not favored; if a local planning area hosts a landfill, it may not reserve landfill capacity for its own needs while banning garbage from outside the planning area. The undisputed facts show that all garbage is treated identically, regardless of origin. Establishment of evenhanded caps for waste disposal sites has been recognized as permissible under the Commerce Clause. *See, Chemical Waste Management, Inc.* 112 S.Ct. at 2015.

64. The Court also finds that any burden on interstate commerce is indirect, given the undisputed facts demonstratining that garbage is moving freely into and out of Kentucky. EK Resources sought full, unrestricted access to a particular local market, but this does not mean that interstate commerce has been directly burdened. *Minnesota v. Clover Leaf Creamery, supra*; *Kleenwell, supra*. The Commerce Clause requires an examiantion of the overall effect of local law on both local and interstate activity. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579, 106 S.Ct. 2080, 2084, 90 L.Ed.2d 552 (1986). The burden for a landfill developer of being considered in a local plan and getting a local determination is outweighed by the undisputed benefits from derived [sic] the Commonwealth's implementation of SB 2.

65. The Court finds that solid waste planning is a fundamentally local problem requring local solutions with state oversight. SB 2 properly ties local planning to landfill permitting because while people in the landfill business have an incentive to build landfills they may not have an incentive to diversify into waste reduction technologies. Connecting planning to permitting requires local officials, their consitutents, and landfill operators to work together on locally-based solutions for reducing reliance on landfills, and no less burdensome means of achieving this legitimate state interest was identified in the record.

Comparing The Kentucky Program To Other Solid Waste Programs Reviewed Under the Commerce Clause

66. The Commerce Clause cases on solid waste deal with the following scenarios; the Court finds that Kentucky's solid waste program presents none of them:

a. Discrimination against foreign garbage (out-of-state or outside the local planning area) was addressed in [*City of*] *Philadelphia v. New Jersey, supra*; and *Fort Gratiot, supra*. The Commerce Clause says that discrimination is disparate treatment favoring a local interest over foreign ones. This means banning or discriminating against foreign garbage while allowing local garbage to be disposed. In the Kentucky program there is no disparate treatment because all garbage is treated the same way. Either a local planning area says no to all garbage, including its own, or it accepts garbage from outside the county. This is the evenhanded treatment the United States Supreme Court has identified as acceptable.

b. Protection of a local natural resource such as landfill capacity against use by others out-of-state or outside of the local planning area was addressed in *Philadelphia v. New Jersey, supra; Fort Gratiot, supra; Chemical Waste Management v. Hunt, supra*. This is another way of saying no to foreign garbage; the described motivation is protection of a scarce resource for citizens of the local area. States and local planning areas may slow the flow into their landfills and may apply caps to landfill size as long as they do it evenhandedly. *Id.* Kentucky's program slows the flow by the waste reduction goal. A local planning area may market its garbage without siting a landfill; regional landfills are cost-effective, and the Commerce Clause does not mandate construction of a landfill in every county. But if a local planning area hosts a landfill it cannot reserve landfill capacity for its own use at the expense of interstate commerce. This does not mean a planning area cannot set limits on size (a source-neutral cap), or ask for identification of sources. This helps with identifying parties potentially responsible for clean-up if the landfill has environmental violations and the local planning area has to clean it up as an open dump under SB 2. *See*, KRS 224.43-345(1)(g)4 (formerly KRS 224.888(10(g)4). Total caps and identification of sources

are permissible state interests and are applied evenhandedly to all wastestreams, regardless of origin.

c. Protection of a preferred local business against competition from others out-of-state, outside the local area, and others within the local area was addressed in *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 114 S.Ct. 1677, ___ L.Ed.2d ___ (1994). This is done by requiring everyone to use a selected local business (essentially a local processing requirement) and effectively shuts out both other local and interstate competition. There is no local business in Magoffin to be favored, since no landfill will exist.

Conclusion

67. EK Resources alleges a Commerce Clause cause of action by saying that the statutes at issue are facially discriminatory by reserveing landfill space for local use, when on plain reading they do not. EK Resources alleges discrimination in practical effect by saying that local garbage is favored over foreign garbage when the undisputed facts show that Kentucky treats all garbage exactly the same regardless of origin, and that garbage is moving freely into and out of Kentucky. The cause of action is thus built not on a statute which on its face authorizes discrimination, or by actions taken under the statute which cause the practical effect of discrimination, but by a claim that discrimination may occur, even though it hasn't. EK Resources would be aggrieved no matter what the state program provides, as long as local planning is a part of it; it is the power to plan, not the way planning is carried out, that EK Resources seeks to have invalidated.

68. What EK Resources has really sought is full, unrestricted access to a local market. While EK Resources may not have access to that local market, there is no evidence in the

record to suggest that EK Resources is shut out of the garbage business completely, or that interstate commerce is unduly burdened by the Kentucky program.[4]

SUMMARY JUDGMENT

69. Fed.R.Civ.P. 56 allows entry of summary judgment when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Summary judgment may be entered despite the existence of complex facts; materiality is judged by the substantive law of the case. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The substantive law in this action is the authority interpreting the Commerce Clause.

70. The facts presented by the parties on the Commerce Clause claims presented by EK Resources are undisputed. Those undisputed facts demonstrate that KRS 224.43-345 and KRS 224.40-315 do not violate the Commerce Clause on their face, in practical effect or in purpose. The defendants are entitled to judgment as a matter of law on the Commerce Clause claims presented in EK Resources' verified complaint.

71. Accordingly, the motions for partial summary judgment of the Commonwealth, the Attorney General, and the

---

[4] For example, there is nothing in the record to suggest that EK Resources is hindered from approaching out-of-state generators of garbage and offering to transport that garbage to Kentucky for disposal, as long as the solid waste program requirements are met and contractual conditions agreed upon among the parties.

Magoffin County Fiscal Court are GRANTED. The motion for partial summary judgment of EK Resources is DENIED.

72. Summary judgment is hereby ENTERED in favor of the Commonwealth, the Attorney General, and the Magoffin County Fiscal Court for the claims set forth in Count 1 of EK Resources' verified complaint.

73. This action will remain on the docket for consideration of the claims presented by EK Resources in those portions of its verified complaint not presenting Commerce Clause claims.

IT IS HEREBY SO ORDERED.

This [20th] day of September, 1995.

/s/
Joseph M. Hood,
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
September 20, 1995

Case Number: 3:94-cv-00062

Richard A. Getty
Walker P. Mayo
Leonard Knee
William Grover Arnett
Gordon B. Long
Kathryn R. Matheny
Kathryn M. Hargraves
Karen Harpenau Rippy
John Stephenson Gillig

Certificate of Mailing by /s/_____.

(2)

Supreme Court, U.S.
FILED
FEB 18 1997
CLERK

No. 97-1194

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

EASTERN KENTUCKY RESOURCES, Et Al., - - - - - *Petitioners,*

versus

THE FISCAL COURT OF MAGOFFIN COUNTY, Et. Al., - - - - - - *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

KATHRYN M. HARGRAVES
Counsel of Record
KATHRYN R. MATHENY
KAREN HARPENAU RIPPY
Natural Resources and Environmental Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, Kentucky 40601
(502) 564-5576
Counsel for Respondents Paul E. Patton, Governor of the Commonwealth of Kentucky, and James E. Bickford, Secretary of the Natural Resources and Environmental Protection Cabinet

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

31 pp

QUESTION PRESENTED

Whether a state municipal solid waste program that links landfill permits to local planning violates the Commerce Clause, by allowing a county either to host a landfill with an evenhanded cap on the landfill's size, or to prohibit all new landfills and to market its garbage outside the county.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. The Case Turned on a Question of Fact, Not Constitutional Law; The Sixth Circuit Correctly Applied Supreme Court Precedents and Issued an Opinion Consistent With Those Precedents and the Opinions of Other Courts.	6
A. EK Resources Did Not Prove That Senate Bill 2 Was Enacted With a Discriminatory Purpose.	9
B. EK Resources Did Not Prove That Senate Bill 2 Discriminates in Practical Effect.	13
C. Because EK Resources Did Not Prove That Senate Bill 2 Has Discriminated Against Interstate Commerce, This Case Is Distinguishable From *Fort Gratiot* and *GSW*.	16
CONCLUSION	18
APPENDIX	1a-6a

TABLE OF AUTHORITIES

PAGE

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 11

Blue Circle Cement v. *Bd. of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994) 8

Brimmer v. *Rebman*, 138 U.S. 78 (1891) 13

C & A Carbone, Inc. v. *Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994) 7

Chambers Medical Technologies of S.C. Ltd. v. *Bryant et al.*, 52 F.3d 1252 (4th Cir. 1995) 8

Chemical Waste Management, Inc. v. *Hunt*, 504 U.S. 334 (1992) 8

City of Philadelphia v. *New Jersey*, 437 U.S. 617 (1978) 7, 8, 9, 14

Dean Milk Co. v. *City of Madison*, 340 U.S. 349 (1951) 13

Eastern Kentucky Resources v. *Arnett*, 892 S.W.2d 617 (Ky. App. 1995) 5

Eastern Kentucky Resources v. *Arnett*, 934 S.W.2d 270 (Ky. 1996) 5, 15

Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117 (1978) 8, 14, 16, 18

Fort Gratiot Sanitary Landfill, Inc. v. *Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992) 16, 17

Gary D. Peake Excavating, Inc. v. *Town Bd. of Hancock*, 93 F.3d 68 (2d Cir. 1996) 10, 12

Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987) 9

GSW v. *Long County*, 999 F.2d 1508 (11th Cir. 1993) 14, 15, 16

H.P. Hood & Sons, Inc. v. *Du Mond*, 336 U.S. 525 (1949) 6

Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) 3

Hughes v. *Oklahoma*, 441 U.S. 322 (1979) 9, 12

Hunt v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) 10, 12

Kassel v. *Consolidated Freightways Corp. of Delaware*, 450 U.S. 662 (1981) 9

PAGE

Cases (Continued):

Kleenwell BioHazard Waste and General Ecology Consultants, Inc. v. *Nelson*, 48 F.3d 391 (9th Cir. 1995) 8

Minnesota v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) 8, 10, 14, 16, 18

Morrow v. *City of Louisville*, 249 S.W. 721 (Ky. 1952) 11

New Energy Company of Indiana v. *Limbach*, 486 U.S. 269 (1988) 7

Old Bridge Chemicals, Inc. v. *New Jersey Dep't of Environmental Protection*, 965 F.2d 1287 (3d Cir. 1992) 8

Oregon Waste Systems v. *Dep't of Environmental Quality of Oregon*, 511 U.S. 93 (1994) 9

Perry v. *Commerce Loan Co.*, 383 U.S. 392 (1966) 10

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) .. 7, 8, 17

SDDS, Inc. v. *South Dakota*, 47 F.3d 263 (8th Cir. 1995) 12

SSC Corp v. *Town of SmithTown.*, 66 F.3d 502 (2d Cir. 1995) 15

Taylor v. *Freeland & Kronz*, 503 U.S. 638 (1992) . 15

U.S. v. *Vuitch*, 402 U.S. 62 (1971) 9

U.S.A. Recycling, Inc. v. *Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995) 14, 16, 18

Constitutional Provisions:

United States Constitution, art. 1, §8, cl. 3 6

Rules:

Supreme Court Rule 14.1(f) 2

Statutes:

Senate Bill 2, Ky. Acts 1991, ch.12 3

KRS 224.40-315 ..... 1, 4, 12, 16

KRS 224.43-010 ..... 1, 3, 4, 10

KRS 224.43-345 ..... 1, 3, 12, 16, 17

Senate Bill 2 (SB2) ..... *passim*

No. 97-1194

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1997

EASTERN KENTUCKY RESOURCES, Et Al., - - *Petitioners,*

versus

THE FISCAL COURT OF MAGOFFIN COUNTY, Et Al., - - - - - - - *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION

The Respondents, Paul E. Patton, in his capacity as Governor of the Commonwealth of Kentucky, and James E. Bickford, in his capacity as Secretary of the Natural Resources and Environmental Protection Cabinet of the Commonwealth of Kentucky, respectfully request that this Court deny the petition for Writ of *Certiorari*, seeking review of the opinion issued by the United States Court of Appeals for the Sixth Circuit in this case. That opinion is reported at 127 F.3d 532 (1997).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are KRS 224.43-345, KRS 224.43-010, and KRS 224.40-315. They are presented

in the appendix because of their length, and because EK Resources' quotations were not set forth verbatim in conformity with Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

This is a case about EK Resources' attempt to site a new municipal solid waste landfill in Magoffin County, Kentucky. Because EK Resources did not succeed, it is petitioning the Supreme Court of the United States to do what the courts below would not—strike Kentucky's program for managing municipal solid waste down under the Commerce Clause. EK Resources did not prevail below because it failed to prove that discrimination by differential treatment existed under the challenged statutes, as is necessary for strict scrutiny under the Commerce Clause. EK Resources now asks the Supreme Court to overturn the findings of fact made by the United States District Court, Eastern District of Kentucky and affirmed by the United States Court of Appeals for the Sixth Circuit, to hold that differential treatment does in fact exist.

In so petitioning, EK Resources omits in its Statement of the Case several key factual findings entered by the courts below. These facts relate to the timing between the landfill proposal and the challenged statute's enactment, the reasons for Kentucky's actions with respect to the landfill permit application, and the events, unrelated to the challenged statute, that hindered construction of the new landfill.

Kentucky's program for managing municipal solid waste (commonly known as garbage) sets design and operation standards for landfills, and links landfill permits to local planning. Kentucky first developed a program regulating garbage disposal in the 1960's, but it emphasized the control of open dumps, with minimal local planning. The local planning that was required was not effective, and was not

linked to the issuance of landfill permits. In 1990, Kentucky's Natural Resources and Environmental Protection Cabinet ("the cabinet") adopted more stringent standards for landfills, and then-Governor Wallace G. Wilkinson announced a special legislative session on garbage.

Senate Bill 2, Ky. Acts 1991, ch.12 ("SB 2") was enacted at the special legislative session, and became effective February 21, 1991. It contains sixty-three sections governing garbage reduction strategies, landfill permits, state and local planning, garbage collection, tax incentives for recycling, and public participation in local planning and permitting. Local planning areas were to be established, and were charged to administer fifteen solid waste planning duties, including the duty to project local garbage disposal needs and to plan for those needs by finding present and future "homes" for garbage. KRS 224.43-345. The goal of SB 2 is to reduce the amount of garbage generated per person by 25%, by using the three basic precepts of solid waste management, "reduce, reuse, and recycle". KRS 224.43-010.

Kentucky counties must either "host" a landfill open to local and out-of-county garbage (including out-of-state garbage), or they may "sell" their garbage outside the county, in which case new landfills are not sited within the county. A county hosting a new landfill may limit its capacity, but only by limiting the total amount of garbage to be accepted. A county may not site a local landfill and reserve its capacity for local use. SB 2, as drafted and administered, does not allow a ban on garbage from outside a county.[1]

---

[1] However, a county may own its own landfill and reserve that landfill for local use without violating the Commerce Clause, under the market participant doctrine established in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Two of Kentucky's 120 counties have selected this option.

SB 2 links landfill permits to local solid waste management plans, by requiring all applications for new landfills to be locally reviewed. KRS 224.40-315. This furthers the legitimate local interest of requiring government officials, local citizens and landfill developers to work together on reducing the amount of garbage generated per person and slowing the flow of garbage into landfills. *See, e.g.,* KRS 224.43-010(2), (3). This "local determination" process applies to all new landfills and substantial expansions of existing landfills.

Under SB 2 all garbage is treated identically, regardless of origin, and garbage moves freely into and out of Kentucky. The record below reflects that the amount of garbage imported to Kentucky from out-of-state has doubled since enactment of SB 2. At the same time, the number of landfills went from 70 to 30. Petitioner's Appendix, pages 25a, 40a ("Pet. 25a, 40a"). The total disposal capacity authorized in the 118 local solid waste plans is double Kentucky's needs as projected over the next ten years, meaning that half of authorized capacity is reserved for out-of-state garbage. *Id.* The Sixth Circuit held that this is an evenhanded approach to managing garbage, presenting no differential treatment benefitting a local economic interest and burdening a foreign interest. (Pet. 26a-27a.) In so holding, the Sixth Circuit affirmed the findings made by the district court. (Pet. 55a-56a.)

EK Resources offers the conclusion in its Statement of the Case that Kentucky acted to stop the proposed landfill since the landfill would accept out-of-state garbage. The record does not support that conclusion. To begin with, SB 2 could not have been enacted to defeat EK Resources' landfill, because it was months after enactment of SB 2 that EK Resources first presented its landfill proposal to the Magoffin County Fiscal Court. (Pet. 44a.) Further, the cabinet rejected EK Resources' permit application be-

cause the county's solid waste management plan, which incorporated the proposed landfill, was defective. (Pet. 44a-45a.) That plan was defective because it allowed the county's old substandard landfill to operate illegally while EK Resources' landfill was being constructed. Indeed, the cabinet included EK Resources' proposed landfill in its own plan for Magoffin County, a plan required by SB 2 because the county failed to submit a timely, completed plan. (Pet. 45a-46a.) A legal challenge to the contract for the proposed landfill entered between EK Resources and the Magoffin Fiscal Court hindered the county's timely completion of a plan. (Pet. 45a.) The legal challenge, as well as changes in the membership of the fiscal court, led to a stalemate among those members and ultimately a county decision not to host a landfill at all. *Id.*

The landfill contract initially entered between EK Resources and the Magoffin County Fiscal Court in December 1991 was ultimately struck down by the Kentucky Supreme Court as violating the Kentucky Constitution, because of the county's failure to allow public notice and competitive bidding on the contract. *Eastern Kentucky Resources* v. *Arnett*, 934 S.W.2d 270 (Ky. 1996). If the Kentucky Supreme Court had instead affirmed the contract, EK Resources would be proceeding to site the landfill as proposed. This demonstrates conclusively that SB 2 is not the source of EK Resources' difficulties. Indeed, EK Resources' failure to follow the Kentucky Constitution in contracting with the county, and its unsuccessful SLAPP suit against local citizens who challenged the contract, provide more than an adequate explanation for its landfill siting woes. *See, Eastern Kentucky Resources* v. *Arnett*, 892 S.W.2d 617 (Ky. App. 1995).

The Sixth Circuit reached a very different conclusion than the one EK Resources submits in its Statement of the Case. Of the events surrounding EK Resources and its

efforts to site a new landfill in Magoffin County, the Sixth Circuit stated:

> When the Cabinet rejected the County's area plan and rewrote a plan for the County, the Cabinet itself suggested that the County use EKR's proposed landfill. However, the contract between EKR and the County was later declared invalid, the composition of the Fiscal Court changed, and the new members decided to do the expedient and not build a landfill at all in Magoffin County. These events were most likely the predominant, if not the only reasons, why EKR did not succeed. (Pet. 25a.)

As the Sixth Circuit concluded in reviewing the facts EK Resources presented, "[t]he Commerce Clause is not a safety valve for those who are simply political process losers". (Pet. 24a.)

REASONS FOR DENYING THE WRIT

I. The Case Turned on a Question of Fact, Not Constitutional Law; The Sixth Circuit Correctly Applied Supreme Court Precedents and Issued an Opinion Consistent With Those Precedents and the Opinions of Other Circuits.

The Commerce Clause states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. 1, § 8, cl. 3. The Supreme Court has established a "dormant" component of the Commerce Clause, which limits a state's ability to pass laws that impermissibly interfere with the flow of interstate commerce. *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 535 (1949). If state legislation discriminates against interstate commerce, it violates the dormant component of the Commerce Clause unless the state or local government shows the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *City of*

Philadelphia v. *New Jersey*, 437 U.S. 617 (1978); *New Energy Company of Indiana* v. *Limbach*, 486 U.S. 269, 274 (1988). Discrimination is defined as differential treatment based on the origin of the article of commerce. *City of Philadelphia*, 437 U.S. at 627-8. However, statutes which regulate evenhandedly and have only indirect effects on commerce are upheld unless the burdens are "clearly excessive in relationship to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Garbage is an article of commerce protected by the Commerce Clause. *See, City of Philadelphia*, 437 U.S. at 622. However, garbage has no economic value; it only has value in the marketplace because of government regulations to ensure its proper disposal as a health and safety measure. Thus, unlike the classical "widgets," garbage has a public health and safety component requiring government intervention. That is the genesis of all solid waste management programs, from collection to disposal. There is a delicate balance between the police power, legitimately exercised to enforce proper management of garbage as a potential health hazard, and the marketplace that delivers this service. This is the reason for the series of waste management-related cases decided under the Commerce Clause since *City of Philadelphia*.

There are two categories of waste management-related regulation that constitute economic protectionism requiring strict scrutiny under the Commerce Clause. The first occurs when foreign waste is banned or restricted while local waste is not, or when a scarce local resource is hoarded for local use, such as when landfill space is reserved for local waste. *See, e.g., City of Philadelphia*, 437 U.S. at 624. The second occurs when a preferred local business is protected against foreign competition, such as when all local waste must be delivered to a local waste disposal facility. *See, e.g., C & A Carbone, Inc.* v. *Town of*

Clarkstown, N.Y., 511 U.S. 383 (1994). This is known as "flow control," and is essentially a local processing requirement. *Id.*

However, economic protectionism is not created by the evenhanded regulation of commerce. If a statute treats commerce evenhandedly, then the statute is entitled to review under the *Pike* balancing test. *Pike* v. *Bruce Church*, 397 U.S. at 142. One type of evenhanded treatment exists when the requirement simply excludes everyone from the marketplace. *See, Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) (upholding a Maryland statute under the Commerce Clause that prohibited all petroleum producers and refiners from owning retail stations); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding a Minnesota statute under the Commerce Clause that prohibited the sale of milk in plastic, non-returnable containers). Another type of evenhanded treatment exists when a local requirement is applied across the board to everyone participating in the marketplace. *Old Bridge Chemicals, Inc.* v. *New Jersey Dep't of Environmental Protection*, 965 F.2d 1287 (3d Cir. 1992) (state recycling code for hazardous waste by products), *cert. denied*, 506 U.S. 1000 (1992); *Kleenwell Biohazard Waste and General Ecology Consultants, Inc.* v. *Nelson*, 48 F.3d 391 (9th Cir. 1995) (certificate of need for all solid waste transporters), *cert. denied*, 515 U.S. 1143 (1995); *Blue Circle Cement* v. *Bd. of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994) (zoning ordinance applicable to all hazardous waste sites). Further, in waste management-related cases this Court has expressly noted that states may act to slow the flow of all waste or to place evenhanded caps on landfills. *City of Philadelphia*, 437 U.S. at 626; *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334, 345 (1992). *Accord, Chambers Medical Technologies of S.C., Inc.* v. *Bryant*, 52 F.3d 1252 (4th Cir. 1995) (upholding a fluctuating cap on the total amount of infectious waste an incinerator may accept).

In challenging the constitutionality of a state statute, EK Resources bears a heavy burden. Statutes should be construed whenever possible so as to uphold their constitutionality. *U.S.* v. *Vuitch*, 402 U.S. 62, 70 (1971). Those who would challenge bona fide state safety regulations using the Commerce Clause must overcome a strong presumption of validity. *Kassel* v. *Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 670 (1981). Thus, while EK Resources charges that the Sixth Circuit erred in applying the balancing test instead of the *per se* test, it fails to acknowledge the factual predicate for imposing strict scrutiny under the *per se* test: Discrimination, the differential treatment of an article of commerce based on its origin, must exist. *Oregon Waste Systems* v. *Dep't of Environmental Quality of Oregon*, 511 U.S. 93 (1994); *Pike* v. *Bruce Church*, 397 U.S. at 142; *City of Philadelphia*, 437 U.S. at 627-8. The burden is on the challenger to demonstrate the existence of differential treatment. *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979). It is this evidentiary burden that EK Resources did not carry.

Thus, EK Resources is in reality asking for the Supreme Court to issue a writ of *certiorari* to the Sixth Circuit for the purpose of overturning allegedly erroneous findings of fact, and not for any compelling reason. Further, the Sixth Circuit affirmed the findings of fact made by the district court. This Court need not review those concurrent findings of fact, since no "extraordinary reason for undertaking this task" exists. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). For that reason, the petition should be denied.

A. Ek Resources Did Not Prove That Senate Bill 2 Was Enacted With a Discriminatory Purpose.

EK Resources asks the Supreme Court to hold that SB 2 has a discriminatory purpose, yet it offers no direct evidence of a discriminatory purpose. Moreover, in its discus-

sion of discriminatory purpose, EK Resources offers no legal authority explaining how the Sixth Circuit either misapplied Supreme Court precedent or contradicted opinions issued by other circuits. Further, EK Resources ignores the opinions issued by the Second and Eighth Circuits in reviewing solid waste-related statutes for a discriminatory purpose.

In framing this argument, EK Resources equates purpose to motive. It is questionable whether motive can be so equated, since without other evidence of discrimination, evidence of motive is of limited probative value. *See, e.g., Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352 (1977); *Gary D. Peake Excavating, Inc.* v. *Town Bd. of Hancock*, 93 F.3d 68, 74 (2d Cir. 1996). Indeed, as the Sixth Circuit noted, articulated legislative objectives are the actual purposes of a statute, and those words are often sufficient in and of themselves to determine those purposes, citing *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 400 (1966); *Clover Leaf Creamery Co.*, 449 U.S. at 463, 471 & nn.7, 15. (Pet. 19a.) Thus, KRS 224.43-010, stating the purpose of SB 2, is adequate evidence to establish legislative purpose. Yet the Sixth Circuit did review the additional evidence EK Resources presented, and concluded, as did the district court, it did not support the premise that SB 2 was enacted with "bad motive". (Pet. 20a-22a, 53a-55a.)

EK Resources tenders as proof that SB 2 was enacted with a discriminatory purpose a 1990 University of Kentucky study commissioned by then-Governor Wallace Wilkinson. This study could not have been "a blueprint" for Kentucky to discriminate against out-of-state garbage, since there is no evidence in the record that then-Governor Wilkinson had any influence over the contents of the study, that the study influenced the vote of any legislator in enacting SB 2, or even that then-Governor Wilkinson appointed the University of Kentucky's president. (Pet. 21a.)

EK Resources attempts to bolster the evidence presented below by making these unsupported statements. Such statements not supported by the record should be disregarded. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158 (1970).

The study was hardly a blueprint for discrimination, even if it had been relied upon. Instead it examined many solid waste management issues, such as those related to open dumping, garbage collection, recycling, landfill design and capacity, local planning, and public participation. It does not focus on public opposition to out-of-state garbage, and where the issue is examined, the study cautions that there is a duty to comply with the Commerce Clause and the judicial precedents interpreting it. (Pet. 53a.)

Similarly irrelevant are the opinions of the later-elected governor, Brereton Jones, and later-elected county judge-executive, Charles Hardin, since there is no evidence in the record that their opinions influenced the actions of the Kentucky legislature in enacting SB 2, or the actions of the cabinet in administering it. (Pet. 54a.) In an attempt to correct this deficiency in the evidence, EK Resources proffers as evidence a footnote in a law review article, in which the author claims familiarity with the enactment of SB 2, and asserts that the working premise of that legislative session was that local landfills could preserve local landfill space for local use through capacity assurance. The author was not a legislator, and even if he were, in construing Kentucky statutes the courts do not inquire into the motives that impel legislative action either before or after such action is taken. *Morrow* v. *City of Louisville*, 249 S.W. 721, 724 (Ky. 1952). Further, since under SB 2 Kentucky counties are not allowed to reserve local landfill space for local use, the author's assertion is simply erroneous.

The evidentiary weaknesses are best illustrated by EK Resources's failure to present the "bad motive" case it re-

lied on below, *SDDS, Inc.* v. *South Dakota*, 47 F.3d 263 (8th Cir. 1995). In *SDDS*, the Eighth Circuit invalidated a South Dakota statute requiring a referendum on environmental issues before any large landfill could be constructed, even though environmental reviews for such landfills were already conducted by the state environmental protection agency. Key to the Eighth Circuit's decision was direct evidence that the statute was enacted with the purpose of stopping a large landfill that proposed to accept out-of-state garbage. By contrast, the Sixth Circuit found no direct evidence to suggest that SB 2 was enacted to stop EK Resources's landfill (or any other any landfill) because it would accept out-of-state garbage, noting that:

> Unfortunately, EKR does not present any such evidence to support its contention that KRS 224.40-315 and KRS 224.43-345 were enacted by the Commonwealth with the purpose of protecting local economic actors from interstate competition. . . . When a party seeks to present circumstantial evidence of discriminatory purpose pursuant to a dormant Commerce Clause challenge, it is the duty of that party to show the effect of that evidence on the challenged statute. (Pet. 21a.)

See, Washington State Apple Advertising Comm'n, 432 U.S. at 351-53; *Peake Excavating, Inc.*, 93 F.3d at 74.

EK Resources bore the burden of demonstrating that SB 2 has a discriminatory purpose, and as the Sixth Circuit correctly held, EK Resources failed to present the evidence necessary to carry that burden. *See, Hughes* v. *Oklahoma*, 441 U.S. at 336. (Pet. 20a, 22a.) The motive argument EK Resources advances in its petition is nothing more than a plea for the Supreme Court to re-examine the evidence presented below. Such a re-examination is not worthy of a writ of *certiorari*.

B. Ek Resources Did Not Prove That Senate Bill 2 Discriminates in Practical Effect.

EK Resources asks the Supreme Court to hold that SB 2 discriminates in practical effect. While EK Resources seeks to persuade that the Sixth Circuit ignored Supreme Court precedents and created a new rule contradicting those precedents, in reality the Sixth Circuit simply applied those precedents to the facts. In its petition EK Resources attempts to manufacture a legal issue out of an issue of fact, after it failed to place the necessary facts into evidence.

EK Resources argues that the 118 area solid waste management plans demonstrate that SB 2 discriminates in practical effect, stating that 85 of those 118 plans "provide no capacity whatsoever for out-of-area (and thus out-of-state) waste." (Pet. 11.) What EK Resources does not state is that those same counties also do not have capacity for local garbage. They do not have capacity for anyone because they do not host a new landfill and they market their garbage elsewhere. After examining all of the 118 plans, both the Sixth Circuit and the district court found no discrimination because the amount of out-of-state garbage imported to Kentucky doubled after enactment of SB 2, despite the fact that the number of Kentucky landfills decreased. (Pet. 25a, 51a.) The Sixth Circuit also found persuasive the fact that landfill capacity is double Kentucky's projected needs over the next decade, meaning half of that capacity is reserved for out-of-state garbage. (Pet. 25a.)

EK Resources cites *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951); *Brimmer* v. *Rebman*, 138 U.S. 78 (1891); and *GSW* v. *Long County*, 999 F.2d 1508 (11th Cir. 1993), in support of its argument that SB 2 discriminates against interstate commerce because even though in-state economic interests are burdened, out-of-state economic interests are also burdened. However, the cases cited are

local barrier cases. In each, a local product (milk in *Dean Milk*, meat in *Brimmer*, garbage in *GSW*) was favored over foreign products, and each local requirement, while it may not have discriminated at the state line, did discriminate at the county line or at some other line dividing local from foreign interests. By contrast, under the Kentucky statutes there is no barrier dividing a local interest from a foreign interest, because there is no local landfill. Either a local planning area hosts a landfill within its borders and sets an evenhanded, origin-neutral cap, or it does not host a landfill and the local garbage is marketed elsewhere. Governments have the ability simply to eliminate a market by virtue of legislation, as long as it is evenhanded and local producers are not favored. *See, e.g., Exxon*, 437 U.S. at 127-8; *Clover Leaf Creamery*, 449 U.S. at 474; *U.S.A. Recycling, Inc.* v. *Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995) (town's decision to eliminate commercial garbage collection service and to take over that responsibility is evenhanded and not discriminatory), *cert. denied*, __ U.S. __, 116 S.Ct. 1419, 134 L.Ed 2d 544 (1996).

Hence, EK Resources must overcome the fact that in Kentucky all economic interests, whether local or foreign, are equally burdened. EK Resources attempts to do so by relying on *GSW* for the principle that a county violates the Commerce Clause if it prohibits new landfills and instead markets its garbage elsewhere. This reliance is misplaced, because *GSW* is simply a local barrier case, involving a contract between a county and a private company to construct a landfill, where the county attempted to renegotiate the contract after its execution to add a 150-mile geographical limit on garbage disposed at the landfill. The Eleventh Circuit applied the strict scrutiny of *City of Philadelphia*, 437 U.S. at 624, and said there was no basis for imposing this new term except for the origin of the waste. The Eleventh Circuit expressly recognized that the contract could have eliminated all competition, stating:

> Long County could have decided not to contract for waste disposal services and not to license a potential provider of such services without violating the Commerce Clause; but once it decided to contract for services and then to place a restriction, it cannot escape constitutional scrutiny. 999 F.3d at 1518.[2]

While *GSW* examines the Commerce Clause in the context of state contracts, it is inapposite because Magoffin County did not site a local landfill with a geographic limit for the garbage it could take. *GSW* does not stand for the proposition that a decision to use a contract to eliminate all competition violates the Commerce Clause.

Further, EK Resources is not challenging its contract with Magoffin County in the case *sub judice*. In fact EK Resources sought in the state court action to hold the county to the terms of that contract. *Eastern Kentucky Resources* v. *Arnett*, 934 S.W.2d 270 (Ky. 1996). Any Commerce Clause issues presented by that contract were not before the courts below, and are therefore not before the Supreme Court. *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645 (1992); Supreme Court Rule 14.1(a). While EK Resources argues that the contracts entered between other Kentucky counties hosting landfills and landfill operators are evidence of discrimination, the relationship between those contracts and the evenhanded caps on landfill size set by those counties is also not before this Court. *Id.*[3]

---

[2] *But see, SSC Corp. v. Town of Smithtown*, (2d Cir. 1995) 66 F.3d 502, 515-519 (town is a market participant exempted from confines of Commerce Clause in contracting for its waste collection and disposal), *cert. denied*, __ U.S. __, 116 S.Ct. 911, 133 L.Ed. 2d 842 (1996).

[3] The district court reviewed the contracts placed into the record. It concluded that any burden they might impose was negated by the undisputed evidence of Kentucky's evenhanded treatment of garbage, and that the contracts were freely negotiated in the marketplace without the cabinet's regulatory oversight. (Pet. 51a-52a.)

The decision not to host a landfill is simply a decision to eliminate all competition, since no local competitors or products are preferred. The Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon*, 437 U.S. at 127-8. In authorizing that decision, SB 2 regulates evenhandedly and the Sixth Circuit correctly reviewed it by using the *Pike* balancing test. *See, Clover Leaf Creamery*, 449 U.S. at 472, *Town of Babylon*, 66 F.3d at 1286-8. The Commerce Clause does not mandate that each county construct a landfill. As the Sixth Circuit held, "we emphatically reject that argument". (Pet. 24a.)

C. Because EK Resources Did Not Prove That Senate Bill 2 Has Discriminated Against Interstate Commerce, This Case Is Distinguishable From *Fort Gratiot* and *GSW*.

EK Resources asks the Supreme Court to hold that the Sixth Circuit has issued an opinion that conflicts with the Eleventh Circuit's opinion in *GSW, supra*, and abrogates the precedent set by the Supreme Court in *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992). Since those cases presented situations where local regulation erected a barrier, either at the county line or at a set distance, this case is distinguishable on its facts, as the Sixth Circuit correctly concluded.

Kentucky's program does condition landfill permits on their relationship to local solid waste management plans. KRS 224.40-315, KRS 224.43-345. In that respect, Kentucky's program is similar to the Michigan solid waste management program struck down by the Supreme Court as violating the Commerce Clause in *Fort Gratiot*. However, the Kentucky and Michigan programs contain a critical difference. In Michigan, a county could exclude foreign garbage from a local landfill by using a local solid waste

management plan. In contrast, Kentucky requires local and foreign garbage to be treated identically. A county must either host a landfill, in which case garbage must be accepted regardless of origin (with an evenhanded cap on capacity), or the county does not host a landfill for anyone, including itself. KRS 224.43-345(1)(l), (m). The Sixth Circuit compared the Kentucky and Michigan programs and held that while the Kentucky statute may distinguish between in-area and out-of-area garbage, it is not a discriminatory distinction because discrimination is the different treatment of local and foreign economic interests that benefit the former and burden the latter. (Pet.18a.)

Because EK Resources did not carry its burden of proving the existence of discrimination, the Sixth Circuit correctly applied the *Pike* balancing test. 397 U.S. at 142. Using the *Pike* test, the Sixth Circuit correctly held that Kentucky carried its burden to establish that SB 2 furthers legitimate local goals, including the goal of reducing the amount of garbage generated per person and thereby slowing the flow of all garbage into landfills. *See, Fort Gratiot,* 504 U.S. at 367; *City of Philadelphia,* 437 U.S. at 626.

Indeed, the Sixth Circuit had difficulty finding even an incidental burden on interstate commerce, stating:

> From the facts presented in this case, it is not clear if the challenged provisions place any incidental burdens on interstate commerce. As noted *supra,* both the County and the Cabinet proposed to use the services of a landfill developer—e.g., EK— which clearly stated, *ex ante,* that it planned to accept out-of-state waste at its proposed landfill. The Cabinet did not appear to believe that the challenged provisions prohibited the acceptance of out-of-state waste into the Commonwealth. There is no evidence in the record that the Cabinet objected to the fact that EKR planned to accept out-of-state waste. EKR does not state what,

> if any, incidental burdens the Commonwealth's waste disposal program places on interstate commerce. Consequently, based upon the record before us, we find that the Commonwealth's clearly legitimate goals outweigh the burdens, if any, that are placed upon interstate commerce. (Pet. 27a.)

EK Resources is really asking this Court to convert the Commerce Clause from a shield protecting interstate commerce to a sword mandating state and local governments to open a local market that would otherwise be closed to all. Yet the decision to allow counties to eliminate all competition is evenhanded in its administration and benefits no local competitor while burdening others. *See, Exxon,* 437 U.S. at 127-8; *Clover Leaf Creamery,* 449 U.S. at 472. Hence, the decision is reviewed under the *Pike, supra,* balancing test, as the Sixth Circuit correctly concluded. *See, Town of Babylon,* 66 F.3d at 1286-8.

CONCLUSION

Kentucky's municipal solid waste management program does not benefit local garbage by burdening foreign garbage, or protect a local landfill operator against competition from foreign landfill operators. It does not preserve landfill space for local use, require local processing, or erect a geographic barrier. The undisputed evidence is that garbage is moving freely into and out of Kentucky, while the Kentucky program is accomplishing the legitimate local goal of reducing garbage generated per person and slowing Kentucky's reliance on landfills. EK Resources has not succeeded in siting a new landfill in Magoffin County, but neither has anyone else. This does not render constitutionally infirm a statewide program that treats all garbage identically, regardless of origin. The Commerce Clause does not prevent a state solid waste management program from eliminating a local market in its entirety. The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

KATHRYN M. HARGRAVES
Counsel of Record
KATHRYN R. MATHENY
KAREN HARPENAU RIPPY
Natural Resources and Environmental Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, Kentucky 40601
(502) 564-5576
Counsel for Respondents Paul E. Patton, Governor of the Commonwealth of Kentucky, and James E. Bickford, Secretary of the Natural Resources and Environmental Protection Cabinet

APPENDIX

APPENDIX

APPENDIX A

224.43-345 CONTENTS OF AREA SOLID WASTE MANAGEMENT PLAN — APPROVAL BY CABINET

(1) Each area solid waste management plan shall be prepared in accordance with administrative regulations to be adopted by the cabinet and shall be required to include the following:

(a) Identification of the area that will be included in the plan;

(b) A demographic study of the planning area of current and projected populations five (5), ten (10) and twenty (20) years in the future. A projection of the amount and source of solid waste generated and requiring disposal at municipal solid waste disposal facilities for each of these time periods shall be provided;

(c) An inventory and description of all existing solid waste management facilities and activities. The description shall include their identity, location, life expectancies, ownership, cost to the users, and level of compliance with state and federal laws. The description is not required to include any solid waste management facility which is operated exclusively by a solid waste generator on property owned by the solid waste generator for the purpose of accepting solid waste from the solid waste generator or waste generated at another facility owned and operated by the generator or wholly-owned subsidiary. After commencement of operation by a solid waste generator of a solid waste disposal facility which is permitted but not included in a solid waste management plan, an amendment to a solid waste management plan shall be required for any solid waste which is to be no longer disposed by the solid waste generator in its own solid waste disposal facility;

(d) An estimate of the area's long-range needs for solid waste management and facilities for five (5), ten (10), and twenty (20) years into the future;

(e) Identification and assessment of current and future solid waste management problems faced by the area. List

any deficiencies with existing solid waste management facilities in meeting current and future area needs, and identify opportunities for improvement;

(f) Outline short-term, mid-term, and long-term goals and objectives of the solid waste management area. The goals and objectives shall be consistent with state policies;

(g) Based on the problems, needs, goals, and objectives previously identified, identify alternative approaches to solid waste management and select the optimal alternatives. Solid waste management activities and facilities to be addressed include:

1. Identification of those regulations and ordinances which provide for proper, safe, and sanitary management of solid waste;

2. A description of proposed improvements to existing solid waste collection and transportation systems;

3. Establishment of a siting procedure and development program to assure the orderly location, development, and financing of new or expanded municipal solid waste management facilities. The plan shall demonstrate how all persons in the planning area will within the near future have reasonable opportunity to dispose of their waste in a manner that complies with state and federal laws;

4. Identification of planned programs for the control and cleanup of litter and open dumps. The programs shall include: a schedule for the cleanup of illegal open dump sites which will result in the cleanup of those sites within one (1) year of cabinet approval of the plan; an annual survey of the county to discover new sites which shall then be scheduled for cleanup within one (1) year; and measures to prevent the recurrence of dumping at sites which are cleaned up;

5. An assessment of opportunities to reduce the need for land disposal by banning grass clippings, leaves, and other yard wastes from municipal solid waste disposal facilities and the institution of composting operations for grass clippings, leaves, and other yard wastes;

6. Establishment of a plan to reduce the need for land disposal through waste reduction and recycling, materials recovery, and energy recovery and the provision of opportunities for recycling that may include, but are not limited to, drop-off centers or door-to-door collection. Where recycling or material recovery is not deemed feasible, specific factual analysis shall be provided to support the conclusion; and

7. A description of any proposed recycling, materials recovery, or energy recovery plan or facility;

(h) A five (5) year schedule and description of activities to be undertaken to implement the proposed plan;

(i) A description of short-term costs of the plan including capital and operational costs on a per ton and per capita basis for each element of the plan, and the identification of the means of financing plan implementation;

(j) Designation of the governing body for implementation of the solid waste management plan or components of the plan. A description of its responsibilities and authority shall be provided;

(k) A description of proposed surveillance and enforcement procedures to assure that solid waste in the planning area is properly managed. Identification of modifications to local laws and regulations necessary to implement the area plan;

(l) Specific provisions to assure that adequate capacity for a ten (10) year period shall be available for municipal solid waste generated in the solid waste management area, and identification of any additional capacity authorized for disposal of out-of-area municipal solid waste;

(m) Contractual agreements for use of waste disposal capacity at any municipal solid waste disposal facility inside or outside the waste management area identified and relied upon in the plan;

(n) Provisions to assure achievement of reductions in municipal solid waste requiring disposal, consistent with the goals of KRS 224.43-010;

(o) Establishment of a public information and participation process including the following components;

1. Formation of an advisory committee comprised of local residents, and business and industry representatives;

2. Preparation of a draft plan for public notice and comment;

3. Convening of a public hearing upon request; and

4. Publication of a response to public comments.

(2) The solid waste management plan shall consist of two (2) parts. The first part shall contain the information described in subsection (1)(a) through (1)(d) and (1)(l) of this section and shall be submitted to the cabinet by October 1, 1991. The second part shall contain the information described in subsection (1)(a) through (1)(o) of this section and shall be submitted to the cabinet by January 1, 1993. The cabinet shall approve or disapprove the first part of the plan within thirty (30) days of receipt, and the second part of the plan within one hundred twenty (120) days of receipt.

224.43-010 POLICY AND PURPOSE — PRIORITIES FOR SOLID WASTE MANAGEMENT PRACTICES — MUNICIPAL SOLID WASTE DISPOSAL REDUCTION GOAL

(1) It is hereby declared to be the policy of this Commonwealth and the purpose of this chapter to provide for the management of solid waste, including reduction, collection, transportation, and disposal in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment.

(2) It is the policy of the Commonwealth to limit and reduce the amount of solid waste disposed in municipal solid waste disposal facilities in the Commonwealth and to encourage a regional approach to solid waste management.

(3) It is the policy of the Commonwealth that a comprehensive and integrated waste management system to

handle solid waste is to be fostered. State policies and funding assistance shall reflect a preference for solid waste management practices according to the following priority:

(a) Reduction in the amount of waste generated;

(b) Reuse of solid waste;

(c) Waste recycling or yard waste composting;

(d) Resource recovery through mixed municipal solid waste composting or incineration;

(e) Land disposal in publicly-owned landfills or incineration of solid waste without energy recovery; and

(f) Land disposal in landfills other than publicly-owned landfills.

(4) It is further the goal of this Commonwealth that the amount by weight of municipal solid waste disposed at municipal solid waste disposal facilities shall be reduced by a minimum of twenty-five percent (25%) by July 1, 1997, as compared to fiscal year 1993 on a statewide per capita basis. However, credit shall be given for reductions achieved prior to 1993 when accurate measurements are available. The reduction goal shall not apply to special wastes as designated by KRS 224.50-760 or industrial solid waste.

224.40-315 REQUIREMENTS FOR ACCEPTANCE AND APPROVAL OF PERMITS TO CONSTRUCT OR EXPAND MUNICIPAL SOLID WASTE DISPOSAL FACILITY

(1) No permit to construct or expand a municipal solid waste disposal facility shall be accepted for processing by the cabinet unless the application contains a determination from the governing body for the solid waste management area in which the facility is or will be located concerning the consistency of the application with the area solid waste management plan submitted under KRS 224.43-345(1)(a) to (d) and (l) until January 1, 1993, and the entire plan after January 1, 1993. The governing body for the area shall, within sixty (60) days of receipt of a written request, make the determination after public notice and opportunity for public comment and public hearing. For

applications with a notice of intent filed prior to February 26, 1991, the cabinet shall continue to process the application but no permit shall be approved until the governing body for the solid waste management area in which the facility is or will be located has made a determination in accordance with this section.

(2) No permit to construct or expand a municipal solid waste disposal facility shall be approved unless the applicant affirmatively demonstrates and the cabinet makes a written finding in the preliminary determination made pursuant to KRS 224.40-310(2) that the application conforms to and is consistent with all of the following:

(a) The capacity needs identified in the area solid waste management plan;

(b) Other elements of the area solid waste management plan, for permit applications filed after approval of those elements;

(c) The statewide solid waste reduction and management plan, for permit applications filed after completion of the plan; and

(d) Applicable zoning regulations adopted pursuant to KRS Chapter 100.

(3) If the cabinet approves a permit to construct or expand a municipal solid waste management facility after the governing body for the area has determined the application to be inconsistent with the area solid waste management plan, as part of the written finding the cabinet shall state in detail the reasons why it did not accept the determination of the governing body for the area.

(4) For the purposes of this section, the term municipal solid waste disposal facility includes, in addition to those facilities defined in KRS 224.01-010(15), any residual or contained landfill or incinerator disposing of industrial solid waste for a fee, but does not include a waste site or facility which is operated exclusively by a solid waste generator on property owned by the solid waste generator which accepts only industrial solid waste from the solid waste generator or industrial solid waste generated at another facility owned and operated by the generator or wholly-owned subsidiary.

Supreme Court, U.S.
FILED
MAR 23 1998
CLERK

(3)

No. 97-1194

In The

Supreme Court of the United States

October Term, 1997

EASTERN KENTUCKY RESOURCES, *et al.*,

Petitioners,

vs.

THE FISCAL COURT OF MAGOFFIN COUNTY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE FISCAL COURT OF MAGOFFIN COUNTY

WILLIAM GROVER ARNETT
Magoffin County Attorney
Attorney for Respondent
The Fiscal Court of Magoffin County
P.O. Box 648
Salyersville, Kentucky 41465
(606) 349-2065

145456

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

39 pp

QUESTION PRESENTED

Whether a state municipal solid waste program that links landfill permits to local planning violates the Commerce Clause, by allowing a county either to host a landfill with an evenhanded cap on the landfill's size, or to prohibit all new landfills and to market its garbage outside the county.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations iii

Statutory Provisions Involved 1

Statement of the Case 1

Reasons for Denying the Writ 8

I. The Case Turned On A Question Of Fact, Not Constitutional Law; The Sixth Circuit Correctly Applied Supreme Court Precedents And Issued An Opinion Consistent With Those Precedents And The Opinions Of Other Circuits. 8

A. EK Resources Did Not Prove That Senate Bill 2 Was Enacted With a Discriminatory Purpose. 11

B. EK Resources Did Not Prove That Senate Bill 2 Discriminates in Practical Effect. .. 15

C. Because EK Resources Did Not Prove That Senate Bill 2 Has Discriminated Against Interstate Commerce, This Case Is Distinguishable From *Fort Gratiot* and *GSW*. 19

Conclusion 22

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) ... 12

Blue Circle Cement v. Bd. of County Comm'rs, 27 F.3d 1499 (10th Cir. 1994) 10

Brimmer v. Rebman, 138 U.S. 78 (1891) 16

C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994) 9

Chambers Medical Technologies of S.C., Inc. v. Bryant, 52 F.3d 1252 (4th Cir. 1995) 10

Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992) 10

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 8, 9, 10, 11, 17, 20

Clover Leaf Creamery Co., 449 U.S. at 463 ... 12, 16, 18, 21

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 16

Eastern Kentucky Resources v. Arnett, 892 S.W. 2d 617 (Ky. App. 1995) 6

Contents

Page

Eastern Kentucky Resources v. Arnett, 934 S.W. 2d 270 (Ky. 1996) 5, 6, 17

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 9, 16, 18, 21

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353 (1992) 19, 20

Gary D. Peake Excavating, Inc. v. Town Bd. of Hancock, 93 F.3d 68 (2d Cir. 1996) 12, 14

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) .. 11

GSW v. Long County, 999 F.2d 1508 (11th Cir. 1993) 16, 17, 19

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) 8

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 4

Hughes v. Oklahoma, 441 U.S. 322 (1979) 11, 15

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) 11, 12, 14

Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662 (1981) 10

Contents

	Page
Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson, 48 F.3d 391 (9th Cir. 1995), *cert. denied*, 515 U.S. 1143 (1995)	10
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)	10
Morrow v. City of Louisville, 249 S.W. 721 (Ky. 1952)	13
New Energy Company of Indiana v. Limbach, 486 U.S. 269 (1988)	8
Old Bridge Chemicals, Inc. v. New Jersey Dep't of Environmental Protection, 965 F.2d 1287 (3d Cir. 1992), *cert. denied*, 506 U.S. 1000 (1992)	10
Oregon Waste Systems v. Dep't of Environmental Quality of Oregon, 511 U.S. 93 (1994)	11
Perry v. Commerce Loan Co., 383 U.S. 392 (1966) ..	12
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	8, 9, 11, 20, 21
SDDS, Inc. v. South Dakota, 47 F.3d 263 (8th Cir. 1995)	14
SSC Corp. v. Town of Smithtown, (2d Cir. 1995) 66 F.3d 502, *cert. denied*, __ U.S. __, 116 S. Ct. 911, 133 L. Ed. 2d 842 (1996)	17, 18

Contents

Page

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 18

United States v. Vuitch, 402 U.S. 62 (1971) 10

U.S.A. Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996) 16, 18, 19, 21

Statutes Cited:

KRS 224.40-315 ..... 1, 4, 19

KRS 224.43-010 ..... 1, 3, 12

KRS 224.43-010(2) 4

KRS 224.43-010(3) 4

KRS 224.43-345 ..... 1, 2, 3, 19

KRS 224.43-345(1)(*l*) 19

KRS 224.43-345(1)(m) 19

Senate Bill 2, Ky. Acts 1991, ch. 12 .... 2, 3, 4, 5, 6, 11, 12, 13, 14, 15, 20

United States Constitution Cited:

Art. 1, § 8, cl. 3 8

Contents

Page

Rules Cited:

Supreme Court Rule 14.1(a) 18

Supreme Court Rule 14.1(f) 1

APPENDIX

Appendix A — Kentucky Revised Statutes 1a

§ 224.43-345 ..... 1a

§ 223.43-010 ..... 5a

§ 224.40-315 ..... 7a

The Respondents, Paul E. Patton, in his capacity as Governor of the Commonwealth of Kentucky, and James E. Bickford, in his capacity as Secretary of the Natural Resources and Environmental Protection Cabinet of the Commonwealth of Kentucky, and The Fiscal Court of Magoffin County, respectfully request that this Court deny the petition for Writ of Certiorari, seeking review of the opinion issued by the United States Court of Appeals for the Sixth Circuit in this case. That opinion is reported at 127 F.3d 532 (1997).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are KRS 224.43-345, KRS 224.43-010, and KRS 224.40-315. They are presented in the appendix because of their length, and because EK Resources' quotations were not set forth verbatim in conformity with Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

This is a case about EK Resources' attempt to site a new municipal solid waste landfill in Magoffin County, Kentucky. Because EK Resources did not succeed, it is petitioning the Supreme Court of the United States to do what the courts below would not - strike Kentucky's program for managing municipal solid waste down under the Commerce Clause. EK Resources did not prevail below because it failed to prove that discrimination by differential treatment existed under the challenged statutes, as is necessary for strict scrutiny under the Commerce Clause. EK Resources now asks the Supreme Court to overturn the findings of fact made by the United States District Court, Eastern District of Kentucky and affirmed by the United States Court of Appeals for the Sixth Circuit, to hold that differential treatment does in fact exist.

In so petitioning, EK Resources omits in its Statement of the Case several key factual findings entered by the courts below. These facts relate to the timing between the landfill proposal and the challenged statute's enactment, the reasons for Kentucky's actions with respect to the landfill permit application, and the events, unrelated to the challenged statute, that hindered construction of the new landfill.

Kentucky's program for managing municipal solid waste (commonly known as garbage) sets design and operation standards for landfills, and links landfill permits to local planning. Kentucky first developed a program regulating garbage disposal in the 1960's, but it emphasized the control of open dumps, with minimal local planning. The local planning that was required was not effective, and was not linked to the issuance of landfill permits. In 1990, Kentucky's Natural Resources and Environmental Protection Cabinet ("the cabinet") adopted more stringent standards for landfills, and then-Governor Wallace G. Wilkinson announced a special legislative session on garbage.

Senate Bill 2, Ky. Acts 1991, ch.12 ("SB 2") was enacted at the special legislative session, and became effective February 21, 1991. It contains sixty-three sections governing garbage reduction strategies, landfill permits, state and local planning, garbage collection, tax incentives for recycling, and public participation in local planning and permitting. Local planning areas were to be established, and were charged to administer fifteen solid waste planning duties, including the duty to project local garbage disposal needs and to plan for those needs by finding present and future "homes" for garbage. KRS 224.43-345.[1] The goal of SB 2 is to reduce the amount of

1. It has been well noted in the lower Federal Court opinions that Kentucky has made great progress in recycling. In 1990, prior (Cont'd)

garbage generated per person by 25%, by using the three basic precepts of solid waste management, "reduce, reuse, and recycle". KRS 224.43-010.

(Cont'd)
to Senate Bill 2, 104 of 120 counties reported that no recycling programs existed within the planning area; in 1993, well after the implementation of Senate Bill 2, the local garbage plans showed **that only 26 remaining counties of 120 counties do not have recycling programs.** Furthermore, to date, 97 of 120 counties have data on garbage collection rates, etc.... **with all** 120 counties having local citizen advisory committees.

Magoffin County has in one sense taken the lead in it's effort to reduce, reuse and recycle waste pursuant to KRS 224.43-345. In 1995, the newly instituted recycle center disposed of 141,000 pounds of "in-county waste" with minimal recycle material from "out-of-county". In 1996, 207,000 pounds of "in-county waste" was recycled plus 64,000 pounds of "out-of-county waste" recycled. Then, as of 1997 year end, a record 390,000 pounds of "in-county waste" was recycled plus 50,000 pounds of "out-of-county waste". These figures do not account at all for used appliances or larger materials that are taken to Magoffin County's transfer station. Primarily, the figures above account for paper, plastic, glass and other such similar household waste.

Magoffin County's recycle program, albiet it partially funded, is primarily comprised of civic minded citizen volunteers who tirelessly give up their free time. These citizens and Magoffin's recycle program as a whole have been recognized time and again as a leader in recycling by television, newspaper, the Kentucky Division of Waste Management and by Resolution of the Kentucky Senate. This program of recycling is not only unique for the reasons stated, but is also different because there are no consultants hired to write the solid waste plan for the County. Instead, this plan is written by a citizen comprised solid waste advisory board. Without this local citizen participation, this successful program of rural recycling would not have been possible.

Kentucky counties must either "host" a landfill open to local and out-of-county garbage (including out-of-state garbage), or they may "sell" their garbage outside the county, in which case new landfills are not sited within the county. A county hosting a new landfill may limit its capacity, but only by limiting the total amount of garbage to be accepted. A county may not site a local landfill and reserve its capacity for local use. SB 2, as drafted and administered, does not allow a ban on garbage from outside a county.[2]

SB 2 links landfill permits to local solid waste management plans, by requiring all applications for new landfills to be locally reviewed. KRS 224.40-315. This furthers the legitimate local interest of requiring government officials, local citizens and landfill developers to work together on reducing the amount of garbage generated per person and slowing the flow of garbage into landfills. *See, e.g.*, KRS 224.43-010(2), (3). This "local determination" process applies to all new landfills and substantial expansions of existing landfills.

Under SB 2 all garbage is treated identically, regardless of origin, and garbage moves freely into and out of Kentucky. The record below reflects that the amount of garbage imported to Kentucky from out-of-state has doubled since enactment of SB 2. At the same time, the number of landfills went from 70 to 30. Petitioner's Appendix, pages 25a, 40a ("Pet. 25a, 40a"). The total disposal capacity authorized in the 118 local solid waste plans is double Kentucky's needs as projected over the next ten years, meaning that half of authorized capacity is reserved for out-of-state garbage. *Id.* The Sixth Circuit held

---

2. However, a county may own its own landfill and reserve that landfill for local use without violating the Commerce Clause, under the market participant doctrine established in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Two of Kentucky's 120 counties have selected this option.

that this is an evenhanded approach to managing garbage, presenting no differential treatment benefiting a local economic interest and burdening a foreign interest. (Pet. 26a-27a). In so holding, the Sixth Circuit affirmed the findings made by the district court. (Pet. 55a-56a).

EK Resources offers the conclusion in its Statement of the Case that Kentucky acted to stop the proposed landfill since the landfill would accept out-of-state garbage. The record does not support that conclusion. To begin with, SB 2 could not have been enacted to defeat EK Resources' landfill, because it was months after enactment of SB 2 that EK Resources first presented its landfill proposal to the Magoffin County Fiscal Court. (Pet. 44a). Further, the cabinet rejected EK Resources' permit application because the county's solid waste management plan, which incorporated the proposed landfill, was defective. (Pet. 44a-45a). That plan was defective because it allowed the county's old substandard landfill to operate illegally while EK Resources' landfill was being constructed. Indeed, the cabinet included EK Resources' proposed landfill in its own plan for Magoffin County, a plan required by SB 2 because the county failed to submit a timely, completed plan. (Pet. 45a-46a). A legal challenge to the contract for the proposed landfill entered between EK Resources and the Magoffin Fiscal Court hindered the county's timely completion of a plan. (Pet. 45a). The legal challenge, as well as changes in the membership of the fiscal court, led to a stalemate among those members and ultimately a county decision not to host a landfill at all. *Id.*

The landfill contract initially entered between EK Resources and the Magoffin County Fiscal Court in December 1991 was ultimately struck down by the Kentucky Supreme Court as violating the Kentucky Constitution, because of the county's failure to allow public notice and competitive bidding on the contract. *Eastern Kentucky Resources v. Arnett*, 934 S.W. 2d

270 (Ky. 1996). If the Kentucky Supreme Court had instead affirmed the contract, EK Resources would be proceeding to site the landfill as proposed. This demonstrates conclusively that SB 2 is not the source of EK Resources' difficulties. Indeed, EK Resources' failure to follow the Kentucky Constitution in contracting with the county, and its unsuccessful SLAPP suit against local citizens who challenged the contract, provide more than an adequate explanation for its landfill siting woes. *See, Eastern Kentucky Resources v. Arnett*, 892 S.W. 2d 617 (Ky. App. 1995).[3]

---

3. The failure of the Fiscal Court of Magoffin to issue public notice or to follow certain basic competitive bidding practices in 1991 in regard to the corporation, EK Resources, was no oversight or mistake. At this time, the Magoffin County Fiscal Court was advised by then County Attorney John "Jack" Collins and his Assistant County Attorney Gregory D. Allen. Magoffin County Attorney Assistant Gregory D. Allen was the nephew of Charles Allen, who was Magoffin County Judge at the time. County Judge Charles Allen heavily courted EK Resources and their money. County Judge Allen met with them in private and was supported by real estate agent, Darvin Allen, father of Gregory D. Allen, in his efforts to bring out-of-state garbage into Magoffin County. Attorney Allen even prepared deeds of conveyance for EK Resources who purchased the land for the landfill in the small community of Half Mountain, Kentucky. Meanwhile, after a series of secret and private meetings were held by County Judge Charles Allen with various entities who promoted out-of-state garbage, these secret events were discovered by then Salyersville Independent reporter, Jerry Hardt. Once the story went to press, the public became outraged that all of this had been hidden from their view and the people exercised their freedom of speech and right to vote in simultaneous fashion. Some fiscal court members resigned. County Judge Allen died while in office. Then, at election time, the voters of Magoffin County did the rest by voting in new fiscal court members, County Judge, County Attorney, Circuit Clerk, District Judge, etc... Thus, through the will of the people, the solid waste plan of Magoffin **simply reflects the deisres of citizens of**

(Cont'd)

The Sixth Circuit reached a very different conclusion than the one EK Resources submits in its Statement of the Case. Of the events surrounding EK Resources and its efforts to site a new landfill in Magoffin County, the Sixth Circuit stated:

> When the Cabinet rejected the County's area plan and rewrote a plan for the County, the Cabinet itself suggested that the County use EKR's proposed landfill. However, the contract between EKR and the County was later declared invalid, the composition of the Fiscal Court changed, and the new members decided to do the expedient and not build a landfill at all in Magoffin County. These events were most likely the predominant, if not the only reasons, why EKR did not succeed.

(Pet. 25a). As the Sixth Circuit concluded in reviewing the facts EK Resources presented, "[t]he Commerce Clause is not a safety valve for those who are simply political process losers". (Pet. 24a).

(Cont'd)
Magoffin by preventing the location of any landfill in its borders for either local or out-of-state waste. This response and attitude of the citizens of Magoffin can be attributed to many factors, but of paramount concern is that Magoffin County houses the head waters of the Licking River that empties into the Ohio River. The head waters of the Licking River is where the first landfill was scheduled to be located (Half Mountain), receiving 10,000 tons of trash each day.

REASONS FOR DENYING THE WRIT

I.

THE CASE TURNED ON A QUESTION OF FACT, NOT CONSTITUTIONAL LAW; THE SIXTH CIRCUIT CORRECTLY APPLIED SUPREME COURT PRECEDENTS AND ISSUED AN OPINION CONSISTENT WITH THOSE PRECEDENTS AND THE OPINIONS OF OTHER CIRCUITS.

The Commerce Clause states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. 1, § 8, cl. 3. The Supreme Court has established a "dormant" component of the Commerce Clause, which limits a state's ability to pass laws that impermissibly interfere with the flow of interstate commerce. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). If state legislation discriminates against interstate commerce, it violates the dormant component of the Commerce Clause unless the state or local government shows the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 274 (1988). Discrimination is defined as differential treatment based on the origin of the article of commerce. *City of Philadelphia*, 437 U.S. at 627-28. However, statutes which regulate evenhandedly and have only indirect effects on commerce are upheld unless the burdens are "clearly excessive in relationship to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Garbage is an article of commerce protected by the Commerce Clause. *See City of Philadelphia*, 437 U.S. at 622.

However, garbage has no economic value; it only has value in the marketplace because of government regulations to ensure its proper disposal as a health and safety measure. Thus, unlike the classical "widgets," garbage has a public health and safety component requiring government intervention. That is the genesis of all solid waste management programs, from collection to disposal. There is a delicate balance between the police power, legitimately exercised to enforce proper management of garbage as a potential health hazard, and the marketplace that delivers this service. This is the reason for the series of waste management-related cases decided under the Commerce Clause since *City of Philadelphia.*

There are two categories of waste management-related regulation that constitute economic protectionism requiring strict scrutiny under the Commerce Clause. The first occurs when foreign waste is banned or restricted while local waste is not, or when a scarce local resource is hoarded for local use, such as when landfill space is reserved for local waste. *See, e.g., City of Philadelphia*, 437 U.S. at 624. The second occurs when a preferred local business is protected against foreign competition, such as when all local waste must be delivered to a local waste disposal facility. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994). This is known as "flow control," and is essentially a local processing requirement. *Id.*

However, economic protectionism is not created by the evenhanded regulation of commerce. If a statute treats commerce evenhandedly, then the statute is entitled to review under the *Pike* balancing test. *Pike v. Bruce Church,* 397 U.S. at 142. One type of evenhanded treatment exists when the requirement simply excludes everyone from the marketplace. *See Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978) (upholding a Maryland statute under the Commerce Clause that prohibited all petroleum producers and refiners from owning

retail stations); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding a Minnesota statute under the Commerce Clause that prohibited the sale of milk in plastic, non-returnable containers). Another type of evenhanded treatment exists when a local requirement is applied across the board to everyone participating in the marketplace. *Old Bridge Chemicals, Inc. v. New Jersey Dep't of Environmental Protection*, 965 F.2d 1287 (3d Cir. 1992) (state recycling code for hazardous waste by products), *cert. denied*, 506 U.S. 1000 (1992); *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995) (certificate of need for all solid waste transporters), *cert. denied*, 515 U.S. 1143 (1995); *Blue Circle Cement v. Bd. of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994) (zoning ordinance applicable to all hazardous waste sites). Further, in waste management-related cases this Court has expressly noted that states may act to slow the flow of all waste or to place evenhanded caps on landfills. *City of Philadelphia*, 437 U.S. at 626; *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 345 (1992). *Accord, Chambers Medical Technologies of S.C., Inc. v. Bryant*, 52 F.3d 1252 (4th Cir. 1995) (upholding a fluctuating cap on the total amount of infectious waste an incinerator may accept).

In challenging the constitutionality of a state statute, EK Resources bears a heavy burden. Statutes should be construed whenever possible so as to uphold their constitutionality. *United States v. Vuitch*, 402 U.S. 62, 70 (1971). Those who would challenge bona fide state safety regulations using the Commerce Clause must overcome a strong presumption of validity. *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 670 (1981). Thus, while EK Resources charges that the Sixth Circuit erred in applying the balancing test instead of the *per se* test, it fails to acknowledge the factual predicate for imposing strict scrutiny under the *per se* test: Discrimination, the differential treatment of an article of commerce based on its

origin, must exist. *Oregon Waste Systems v. Dep't of Environmental Quality of Oregon*, 511 U.S. 93 (1994); *Pike v. Bruce Church*, 397 U.S. at 142; *City of Philadelphia*, 437 U.S. at 627-8. The burden is on the challenger to demonstrate the existence of differential treatment. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). It is this evidentiary burden that EK Resources did not carry.

Thus, EK Resources is in reality asking for the Supreme Court to issue a writ of *certiorari* to the Sixth Circuit for the purpose of overturning allegedly erroneous findings of fact, and not for any compelling reason. Further, the Sixth Circuit affirmed the findings of fact made by the district court. This Court need not review those concurrent findings of fact, since no "extraordinary reason for undertaking this task" exists. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). For that reason, the petition should be denied.

A. EK Resources Did Not Prove That Senate Bill 2 Was Enacted With a Discriminatory Purpose.

EK Resources asks the Supreme Court to hold that SB 2 has a discriminatory purpose, yet it offers no direct evidence of a discriminatory purpose. Moreover, in its discussion of discriminatory purpose, EK Resources offers no legal authority explaining how the Sixth Circuit either misapplied Supreme Court precedent or contradicted opinions issued by other circuits. Further, EK Resources ignores the opinions issued by the Second and Eighth Circuits in reviewing solid waste-related statutes for a discriminatory purpose.

In framing this argument, EK Resources equates purpose to motive. It is questionable whether motive can be so equated, since without other evidence of discrimination, evidence of motive is of limited probative value. *See, e.g., Hunt v.*

Washington State Apple Advertising Comm'n, 432 U.S. 333, 352 (1977); *Gary D. Peake Excavating, Inc. v. Town Bd. of Hancock,* 93 F.3d 68, 74 (2d Cir. 1996). Indeed, as the Sixth Circuit noted, articulated legislative objectives are the actual purposes of a statute, and those words are often sufficient in and of themselves to determine those purposes, citing *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966); *Clover Leaf Creamery Co.*, 449 U.S. at 463, 471 & nn.7, 15. (Pet. 19a). Thus, KRS 224.43-010, stating the purpose of SB 2, is adequate evidence to establish legislative purpose. Yet the Sixth Circuit did review the additional evidence EK Resources presented, and concluded, as did the district court, it did not support the premise that SB 2 was enacted with "bad motive". (Pet. 20a-22a, 53a-55a).

EK Resources tenders as proof that SB 2 was enacted with a discriminatory purpose a 1990 University of Kentucky study commissioned by then-Governor Wallace Wilkinson. This study could not have been "a blueprint" for Kentucky to discriminate against out-of-state garbage, since there is no evidence in the record that then-Governor Wilkinson had any influence over the contents of the study, that the study influenced the vote of any legislator in enacting SB 2, or even that then-Governor Wilkinson appointed the University of Kentucky's president. (Pet. 21a). EK Resources attempts to bolster the evidence presented below by making these unsupported statements. Such statements not supported by the record should be disregarded. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970).

The study was hardly a blueprint for discrimination, even if it had been relied upon. Instead it examined many solid waste management issues, such as those related to open dumping, garbage collection, recycling, landfill design and capacity, local planning, and public participation. It does not focus on public opposition to out-of-state garbage, and where the issue is

examined, the study cautions that there is a duty to comply with the Commerce Clause and the judicial precedents interpreting it. (Pet. 53a).

Similarly irrelevant are the opinions of the later-elected governor, Brereton Jones, and later-elected county judge-executive, Charles Hardin, since there is no evidence in the record that their opinions influenced the actions of the Kentucky legislature in enacting SB 2, or the actions of the cabinet in administering it. (Pet. 54a). In an attempt to correct this deficiency in the evidence, EK Resources proffers as evidence a footnote in a law review article, in which the author claims familiarity with the enactment of SB 2, and asserts that the working premise of that legislative session was that local landfills could preserve local landfill space for local use through capacity assurance. The author was not a legislator, and even if he were, in construing Kentucky statutes the courts do not inquire into the motives that impel legislative action either before or after such action is taken. *Morrow v. City of Louisville*, 249 S.W. 721, 724 (Ky. 1952). Further, since under SB 2 Kentucky counties are not allowed to reserve local landfill space for local use, the author's assertion is simply erroneous.[4]

---

4. Magoffin County Attorney, William Grover Arnett, never directly influenced the passage of SB2. Instead, he was elected by the citizens of Magoffin County, as were many other public officials, to insure that the Magoffin County Solid Waste Plan reflected the interest of the majority. The majority of the people opposed a solid waste plan for Magoffin County that includes establishing a landfill for in-state or out-of-state waste. Many reasons for opposition to any landfill has been voiced, but a fact that can not be overlooked is that EK Resources and the old pro-landfill fiscal court had negotiated the terms of this landfill in secret, purposely hiding it from the public. The result was a galvanized public who stood fast together against at least one clear opponent — a bad government who obviously had a secret deal to hide. Thus, it is clear from the evidence

(Cont'd)

The evidentiary weaknesses are best illustrated by EK Resources' failure to present the "bad motive" case it relied on below, *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995). In *SDDS*, the Eighth Circuit invalidated a South Dakota statute requiring a referendum on environmental issues before any large landfill could be constructed, even though environmental reviews for such landfills were already conducted by the state environmental protection agency. Key to the Eighth Circuit's decision was direct evidence that the statute was enacted with the purpose of stopping a large landfill that proposed to accept out-of-state garbage. By contrast, the Sixth Circuit found no direct evidence to suggest that SB 2 was enacted to stop EK Resources' landfill (or any other any landfill) because it would accept out-of-state garbage, noting that:

> Unfortunately, EKR does not present my such evidence to support its contention that KRS 224.40-315 and KRS 224.43-345 were enacted by the Commonwealth with the purpose of protecting local economic actors from interstate competition. . . . When a party seeks to present circumstantial evidence of discriminatory purpose pursuant to a dormant Commerce Clause challenge, it is the duty of that party to show the effect of that evidence on the challenged statute. (Pet. 21a).

See Washington State Apple Advertising Comm'n, 432 U.S. at 351-53; *Peake Excavating, Inc.*, 93 F.3d at 74.

(Cont'd)
that EK Resources' rights under the Commerce Clause have not been violated, rather they have been discarded along with the rest of the garbage by a public who reacted to the wrong doing of both EK Resources and an earlier Magoffin County Fiscal Court, then County Judge Charles Allen and then County Attorney John "Jack" Collins. Local economic actors versus interstate competition was simply never part of the issue in regard to the people or SB2.

EK Resources bore the burden of demonstrating that SB 2 has a discriminatory purpose, and as the Sixth Circuit correctly held, EK Resources failed to present the evidence necessary to carry that burden. *See Hughes v. Oklahoma*, 441 U.S. at 336. (Pet. 20a, 22a). The motive and argument EK Resources advances in its petition is nothing more than a plea for the Supreme Court to re-examine the evidence presented below, Such a re-examination is not worthy of a writ of certiorari.

B. EK Resources Did Not Prove That Senate Bill 2 Discriminates in Practical Effect.

EK Resources asks the Supreme Court to hold that SB 2 discriminates in practical effect. While EK Resources seeks to persuade that the Sixth Circuit ignored Supreme Court precedents and created a new rule contradicting those precedents, in reality the Sixth Circuit simply applied those precedents to the facts. In its petition EK Resources attempts to manufacture a legal issue out of an issue of fact, after it failed to place the necessary facts into evidence.

EK Resources argues that the 118 area solid waste management plans demonstrate that SB 2 discriminates in practical effect, stating that 85 of those 118 plans "provide no capacity whatsoever for out-of-area (and thus out-of-state) waste." (Pet. 11). What EK Resources does not state is that those same counties also do not have capacity for local garbage. They do not have capacity for anyone because they do not host a new landfill and they market their garbage elsewhere. After examining all of the 118 plans, both the Sixth Circuit and the district court found no discrimination because the amount of out-of-state garbage imported to Kentucky doubled after enactment of SB 2, despite the fact that the number of Kentucky landfills decreased. (Pet. 25a, 51a). The Sixth Circuit also found persuasive the fact that landfill capacity is double Kentucky's

projected needs over the next decade, meaning half of that capacity is reserved for out-of-state garbage. (Pet. 25a).

EK Resources cites *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Brimmer v. Rebman*, 138 U.S. 78 (1891); and *GSW v. Long County*, 999 F.2d 1508 (11th Cir. 1993), in support of its argument that SB 2 discriminates against interstate commerce because even though in-state economic interests are burdened, out-of-state economic interests are also burdened. However, the cases cited are local barrier cases. In each, a local product (milk in *Dean Milk*, meat in *Brimmer*, garbage in *GSW*) was favored over foreign products, and each local requirement, while it may not have discriminated at the state line, did discriminate at the county line or at some other line dividing local from foreign interests. By contrast, under the Kentucky statutes there is no barrier dividing a local interest from a foreign interest, because there is no local landfill. Either a local planning area hosts a landfill within its borders and sets an evenhanded, origin-neutral cap, or it does not host a landfill and the local garbage is marketed elsewhere. Governments have the ability simply to eliminate a market by virtue of legislation, as long as it is evenhanded and local producers are not favored. *See, e.g., Exxon*, 437 U.S. at 127-28; *Clover Leaf Creamery*, 449 U.S. at 474; *U.S.A. Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995) (town's decision to eliminate commercial garbage collection service and to take over that responsibility is evenhanded and not discriminatory), *cert. denied*, __ U.S. __, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996).

Hence, EK Resources must overcome the fact that in Kentucky all economic interests, whether local or foreign, are equally burdened. EK Resources attempts to do so by relying on *GSW* for the principle that a county violates the Commerce Clause if it prohibits new landfills and instead markets its garbage elsewhere. This reliance is misplaced, because *GSW* is simply a

local barrier case, involving a contract between a county and a private company to construct a landfill, where the county attempted to renegotiate the contract after its execution to add a 150-mile geographical limit on garbage disposed at the landfill. The Eleventh Circuit applied the strict scrutiny of *City of Philadelphia*, 437 U.S. at 624, and said there was no basis for Imposing this new term except for the origin of the waste. The Eleventh Circuit expressly recognized that the contract could have eliminated all competition, stating:

> Long County could have decided not to contract for waste disposal services and not to license a potential provider of such services without violating the Commerce Clause; but once it decided to contract for services and then to place a restriction, it cannot escape constitutional scrutiny, 999 F.3d at 1518.[5]

While *GSW* examines the Commerce Clause in the context of state contracts, it is inapposite because Magoffin County did not site a local landfill with a geographic limit for the garbage it could take. *GSW* does not stand for the proposition that a decision to use a contract to eliminate all competition violates the Commerce Clause.

Further, EK Resources is not challenging its contract with Magoffin County in the case *sub judice*. In fact EK Resources sought in the state court action to hold the county to the terms of that contract. *Eastern Kentucky Resources v. Arnett*, 934 S.W. 2d 270 (Ky. 1996). Any Commerce Clause issues presented by that contract were not before the courts below, and are therefore

---

5. *But see SSC Corp. v. Town of Smithtown*, (2d Cir. 1995) 66 F.3d 502, 515-519 (town is a market participant exempted from confines of Commerce Clause in contracting for its waste collection and disposal), *cert. denied*, __ U.S. __, 116 S. Ct. 911, 133 L. Ed. 2d 842 (1996).

not before the Supreme Court. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992); Supreme Court Rule 14.1(a). While EK Resources argues that the contracts entered between other Kentucky counties hosting landfills and landfill operators are evidence of discrimination, the relationship between those contracts and the evenhanded caps on landfill size set by those counties is also not before this Court. *Id.*[6]

2. *But see SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 515-519 (2d Cir. 1995) (town is a market participant exempted from confines of Commerce Clause in contracting for its waste collection and disposal), *cert. denied*, __ U.S. __, 116 S. Ct. 911, 133 L. Ed. 2d 842 (1996).

3. The district court reviewed the contracts placed into the record. It concluded that any burden they might impose was negated by the undisputed evidence of Kentucky's evenhanded treatment of garbage, and that the contracts were freely negotiated in the marketplace without the cabinet's regulatory oversight. (Pet. 51a-52a).

The decision not to host a landfill is simply a decision to eliminate all competition, since no local competitors or products are preferred. The Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon*, 437 U.S. at 127-28. In authorizing that decision, SB 2 regulates evenhandedly and the Sixth Circuit correctly reviewed it by using the *Pike* balancing test. *See Clover Leaf Creamery*, 449 U.S. at 472; *Town of*

---

6. The district court reviewed the contracts placed into the record. It concluded that any burden they might impose was negated by the undisputed evidence of Kentucky's evenhanded treatment of garbage, and that the contracts were freely negotiated in the marketplace without the cabinet's regulatory oversight. (Pet. 51a-52a).

Babylon, 66 F.3d at 1286-88. The Commerce Clause does not mandate that each county construct a landfill. As the Sixth Circuit held, "we emphatically reject that argument". (Pet. 24a).

C. Because EK Resources Did Not Prove That Senate Bill 2 Has Discriminated Against Interstate Commerce, This Case Is Distinguishable From *Fort Gratiot* and *GSW*.

EK Resources asks the Supreme Court to hold that the Sixth Circuit has issued an opinion that conflicts with the Eleventh Circuit's opinion in *GSW*, *supra*, and abrogates the precedent set by the Supreme Court in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992). Since those cases presented situations where local regulation erected a barrier, either at the county line or at a set distance, this case is distinguishable on its facts, as the Sixth Circuit correctly concluded.

Kentucky's program does condition landfill permits on their relationship to local solid waste management plans. KRS 224.40-315, KRS 224.43-345. In that respect, Kentucky's program is similar to the Michigan solid waste management program struck down by the Supreme Court as violating the Commerce Clause in *Fort Gratiot*. However, the Kentucky and Michigan programs contain a critical difference. In Michigan, a county could exclude foreign garbage from a local landfill by using a local solid waste management plan. In contrast, Kentucky requires local and foreign garbage to be treated identically. A county must either host a landfill, in which case garbage must be accepted regardless of origin (with an evenhanded cap on capacity), or the county does not host a landfill for anyone, including itself. KRS 224.43-345(1)(*l*), (m). The Sixth Circuit compared the Kentucky and Michigan programs and held that while the Kentucky statute may distinguish between in-area and out-of-area garbage, it is not a

discriminatory distinction because discrimination is the different treatment of local and foreign economic interests that benefit the former and burden the latter. (Pet. 18a).

Because EK Resources did not carry its burden of proving the existence of discrimination, the Sixth Circuit correctly applied the *Pike* balancing test. 397 U.S. at 142. Using the *Pike* test, the Sixth Circuit correctly held that Kentucky carried its burden to establish that SB 2 furthers legitimate local goals, including the goal of reducing the amount of garbage generated per person and thereby slowing the flow of all garbage into landfills. *See Fort Gratiot*, 504 U.S. at 367; *City of Philadelphia*, 437 U.S. at 626.

Indeed, the Sixth Circuit had difficulty finding even an incidental burden an interstate commerce, stating:

> From the facts presented in this ease, it is not clear if the challenged provisions place any incidental burdens on interstate commerce. As noted *supra*, both the County and the Cabinet proposed to use the services of a landfill developer — e.g., EK — which clearly stated, *ex ante*, that it planned to accept out-of-state waste at its proposed landfill. The Cabinet did not appear to believe that the challenged provisions prohibited the acceptance of out-of-state waste into the Commonwealth. There is no evidence in the record that the Cabinet objected to the fact that EKR planned to accept out-of-state waste. EKR does not state what, if any, incidental burdens the Commonwealth's waste disposal program places on interstate commerce. Consequently, based upon the record before us, we find that the Commonwealth's clearly legitimate goals outweigh the burdens, if any, that are placed upon interstate commerce. (Pet. 27a).

EK Resources is really asking this Court to convert the Commerce Clause from a shield protecting interstate commerce to a sword mandating state and local governments to open a local market that would otherwise be closed to all. Yet the decision to allow counties to eliminate all competition is evenhanded in its administration and benefits no local competitor while burdening others. *See Exxon*, 437 U.S. at 127-8; *Clover Leaf Creamery*, 449 U.S. at 472. Hence, the decision is reviewed under the *Pike*, *supra*, balancing test, as the Sixth Circuit correctly concluded. *See Town of Babylon*, 66 F.3d at 1286-88.

CONCLUSION

Kentucky's municipal solid waste management program does not benefit local garbage by burdening foreign garbage, or protect a local landfill operator against competition from foreign landfill operators. It does not preserve landfill space for local use, require local processing, or erect a geographic barrier. The undisputed evidence is that garbage is moving freely into and out of Kentucky, while the Kentucky program is accomplishing the legitimate local goal of reducing garbage generated per person and slowing Kentucky's reliance on landfills. EK Resources has not succeeded in siting a new landfill in Magoffin County, but neither has anyone else. This does not render constitutionally infirm a statewide program that treats all garbage identically, regardless of origin. The Commerce Clause does not prevent a state solid waste management program from eliminating a local market in its entirety. This is because the Commerce Clause, and for that matter the Constitution of the United States, embraces the democratic principals of popular sovereignty, *i.e.* the right of the people to rule, balanced with the demand that the law must be fairly and equally imposed. Such has been the ruling of the lower Federal Sixth Circuit and her District Court and such has been the case in Magoffin County. With a voice that is crystal clear, the people through their local elected officials have declared that they do not want any landfill placed in Magoffin County. The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM GROVER ARNETT
Magoffin County Attorney
Attorney for Respondent
The Fiscal Court of Magoffin County
P.O. Box 648
Salyersville, Kentucky 41465
(606) 349-2065

APPENDIX

APPENDIX A — KENTUCKY REVISED STATUTES

224.43-345 CONTENTS OF AREA SOLID WASTE MANAGEMENT PLAN - APPROVAL BY CABINET

(1) Each area solid waste management plan shall be prepared in accordance with administrative regulations to be adopted by the cabinet and shall be required to include the following:

(a) Identification of the area that will be included in the plan;

(b) A demographic study of the planning area of current and projected populations five (5), ten (10) and twenty (20) years in the future. A projection of the amount and source of solid waste generated and requiring disposal at municipal solid waste disposal facilities for each of these time periods shall be provided;

(c) An inventory and description of all existing solid waste management facilities and activities. The description shall include their identity, location, life expectancies, ownership, cost to the users, and level of compliance with state and federal laws. The description is not required to include any solid waste management facility which is operated exclusively by a solid waste generator on property owned by the solid waste generator for the purpose of accepting solid waste from the solid waste generator or waste generated at another facility owned and operated by the generator or wholly-owned subsidiary. After commencement of operation by a solid waste generator of a solid waste disposal facility which is permitted but not included in a solid waste management plan, an amendment to a solid waste management plan shall be required for any solid waste which is to be no longer disposed by the solid waste generator in its own solid waste disposal facility;

Appendix A

(d) An estimate of the area's long-range needs for solid waste management and facilities for five (5), ten (10), and twenty (20) years into the future;

(e) Identification and assessment of current and future solid waste management problems faced by the area. List any deficiencies with existing solid waste management facilities in meeting current and future area needs, and identify opportunities for improvement;

(f) Outline short-term, mid-term, and long-term goals and objectives of the solid waste management area. The goals and objectives shall be consistent with state policies.

(g) Based on the problems, needs, goals, and objectives previously identified, identify alternative approaches to solid waste management and select the optimal alternatives. Solid waste management activities and facilities to be addressed include:

1. Identification of those regulations and ordinances which provide for proper, safe, and sanitary management of solid waste;

2. A description of proposed improvements to existing solid waste collection and transportation systems;

3. Establishment of a sitting procedure and development program to assure the orderly location, development, and financing of new or expanded municipal solid waste management facilities. The plan shall demonstrate how all persons in the planning area will within the near future have reasonable opportunity to dispose of their waste in a manner that complies with state and federal laws;

Appendix A

4. Identification of planned programs for the control and cleanup of litter and open dumps. The programs shall include: a schedule for the cleanup of illegal open dump sites which will result in the cleanup of those sites within one (1) year of cabinet approval of the plan; an annual survey of the county to discover new sites which shall then be scheduled for cleanup within one (1) year; and measures to prevent the recurrence of dumping at sites which are cleaned up;

5. An assessment of opportunities to reduce the need for land disposal by banning grass clippings, leaves, and other yard wastes from municipal solid waste disposal facilities and the institution of composting operations for grass clippings, leaves, and other yard wastes;

6. Establishment of a plan to reduce the need for land disposal through waste reduction and recycling, materials recovery, and energy recovery and the provision of opportunities for recycling that may include, but are not limited to, drop-off centers or door-to-door collection. Where recycling or material recovery is not deemed feasible, specific factual analysis shall be provided to support the conclusion; and

7. A description of any proposed recycling, materials recovery, or energy recovery plan or facility;

(h) A five (5) year schedule and description of activities to be undertaken to implement the proposed plan;

(i) A description of short-term costs of the plan including capital and operational costs on a per ton and per capita basis for each element of the plan, and the identification of the means of financing plan implementation;

Appendix A

(j) Designation of the governing body for implementation of the solid waste management plan or components of the plan. A description of its responsibilities and authority shall be provided;

(k) A description of proposed surveillance and enforcement procedures to assure that solid waste in the planning area is properly managed. Identification of modifications to local laws and regulations necessary to implement the area plan;

(l) Specific previsions to assure that adequate capacity for a ten (10) year period shall be available for municipal solid waste generated in the solid waste management area, and identification of any additional capacity authorized for disposal of out-of-area municipal solid waste;

(m) Contractual agreements for use of waste disposal capacity at any municipal solid waste disposal facility inside or outside the waste management area identified and relied upon in the plan;

(n) Provisions to assure achievement of reductions in municipal solid waste requiring disposal, consistent with the goals of KRS 224.43-010;

(o) Establishment of a public information and participation process including the following components;

1. Formation of an advisory committee comprised of local residents, and business and industry representatives;

2. Preparation of a draft plan for public notice and comment;

3. Convening of a public hearing upon request; and

4. Publication of a response to public comments.

(2) The solid waste management plan shall consist of two (2) parts. The first part shall contain the information described in subsection (1)(a) through (1)(d) and (1)(l) of this section and shall be submitted to the cabinet by October 1, 1991. The second part shall contain the information described in subsection 1(a) through 1(o) of this section and shall be submitted to the cabinet by January 1, 1993. The cabinet shall approve or disapprove the first part of the plan within thirty (30) days of receipt, and the second part of the plan within one hundred twenty (120) days of receipt.

223.43-010 POLICY AND PURPOSE — PRIORITIES FOR SOLID WASTE MANAGEMENT PRACTICES — MUNICIPAL SOLID WASTE DISPOSAL REDUCTION GOAL

(1) It is hereby declared to be the policy of this Commonwealth and the purpose of this chapter to provide for the management of solid waste, including reduction, collection, transportation, and disposal in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment.

(2) It is the policy of the Commonwealth to limit and reduce the amount of solid waste disposed in municipal solid waste disposal facilities in the Commonwealth and to encourage a regional approach to solid waste management.

Appendix A

(3) It is the policy of the Commonwealth that a comprehensive and integrated waste management system to handle solid waste is to be fostered. State policies and funding assistance shall reflect a preference for solid waste management practices according to the following priority:

(a) Reduction in the amount of waste generated;

(b) Reuse of solid waste;

(c) Waste recycling or yard waste composting;

(d) Resource recovery through mixed municipal solid waste composting or incineration;

(e) Land disposal in publicly-owned landfills or incineration of solid waste without energy recovery; and

(f) Land disposal in landfills other than publicly-owned landfills.

(4) It is further the goal of this Commonwealth that the amount by weight of municipal solid waste disposed at municipal solid waste disposal facilities shall be reduced by a minimum of twenty-five percent (25%) by July 1, 1997, as compared to fiscal year 1993 on a statewide per capita basis. However, credit shall be given for reductions achieved prior to 1993 when accurate measurements are available. The reduction goal shall not apply to special wastes as designated by KRS 224.50-760 or industrial solid waste.

Appendix A

224.40-315 REQUIREMENTS FOR ACCEPTANCE AND APPROVAL OF PERMITS TO CONSTRUCT OR EXPAND MUNICIPAL SOLID WASTE DISPOSAL FACILITY

(1) No permit to construct or expand a municipal solid waste disposal facility shall be accepted for processing by the cabinet unless the application contains a determination from the governing body for the solid waste management area in which the facility is or will be located concerning the consistency of the application with the area solid waste management plan submitted under KRS 224.43-354(1)(a) to (d) and (1) until January 1, 1993, and the entire plan after January 1, 1993. The governing body for the area shall, within sixty (60) days of receipt of a written request, make the determination after public notice and opportunity for public comment and public hearing. For applications with a notice of intent filed prior to February 26, 1991, the cabinet shall continue to process the application but no permit shall be approved until the governing body for the solid waste management area in which the facility is or will be located has made a determination in accordance with this section.

(2) No permit to construct or expand a municipal solid waste disposal facility shall be approved unless the applicant affirmatively demonstrates and the cabinet makes a written finding in the preliminary determination made pursuant to KRS 224.40.310(2) that the application conforms to and is consistent with all of the following:

(a) The capacity needs identified in the area solid waste management plan;

(b) Other elements of the area solid waste management plan, for permit applications filed after approval of those elements;

(c) The statewide solid waste reduction and management plan, for permit applications filed after completion of the plan; and

(d) Applicable zoning regulations adopted pursuant to KRS Chapter 100.

(3) If the cabinet approves a permit to construct or expand a municipal solid waste management facility after the governing body for the area has determined the application to be inconsistent with the area solid waste management plan, as part of the written finding the cabinet shall state in detail the reasons why it did not accept the determination of the governing body for the area.

(4) For the purposes of this section, the term municipal solid waste disposal facility includes, in addition to those facilities defined in KRS 224.01-010(15), any residual or contained landfill or incinerator disposing of industrial solid waste for a fee, but does not include a waste site or facility which is operated exclusively by a solid waste generator on property owned by the solid waste generator which accepts only industrial solid waste from the solid waste generator or industrial solid waste generated at another facility owned and operated by the generator or wholly-owned subsidiary.

FILED
APR 1 1998
CLERK

(4)

No. 97-1194

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN KENTUCKY RESOURCES, ET AL., PETITIONERS,

v.

THE FISCAL COURT OF MAGOFFIN COUNTY, ET AL.,
RESPONDENTS.

REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WALKER P. MAYO III
Counsel of Record

RICHARD A. GETTY

BOWLES RICE MCDAVID
GRAFF LOVE & GETTY, PLLC
1200 Vine Center Tower
333 West Vine Street
Lexington, Kentucky 40507

COUNSEL FOR PETITIONERS
EASTERN KENTUCKY RESOURCES,
INC., ET AL.

11 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE OVERWHELMING MERIT OF THE PETITIONER'S CHALLENGE WARRANTS ISSUANCE OF A WRIT OF CERTIORARI 2

II. THE BURDEN RESTS UPON THE RESPONDENTS TO SHOW THAT EKR HAS NOT DEMONSTRATED THE FACT OF DIFFERNTIAL TREATMENT 3

A. The Passage Of Statutes And Regulations With An Intent And The Effect Of Prohibiting Interstate Movement Of Goods Violates The Commerce Clause 5

B. Senate Bill 2 Has Raised An Important Policy Issue That Must Be Resolved By The Supreme Court 7

CONCLUSION 7

TABLE OF AUTHORITIES

CASES: Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 4

Baldwin v. Seelig, Inc., 294 U.S. 511 (1935) 7

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 4

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) ... 3

Dean Milk v. Madison, 340 U.S. 349 (1951) 6, 7

General Electric Co. v. Joiner, 118 S.Ct. 512 (1997) 4

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 3-4

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN KENTUCKY RESOURCES, ET AL., PETITIONERS

v.

THE FISCAL COURT OF MAGOFFIN COUNTY, ET AL.,
RESPONDENTS

REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

Eastern Kentucky Resources, Blue Ash Development, Inc., and Royalton Resources, Inc. (collectively "EKR") have filed a Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit requesting that the Supreme Court review a decision of the United States Court of Appeals for the Sixth Circuit affirming a decision of the United States District Court for the Eastern District of Kentucky that upheld the constitutionality of Senate Bill 2 of the 1991 Kentucky General Assembly. Notwithstanding compelling reasons for

such review, the Respondents[1] object to the Petition, arguing, *inter alia*, that the decision turned on a question of fact, not constitutional law, and the Sixth Circuit has correctly applied Supreme Court precedents and the opinions of other Courts. The Respondents' objections are not well founded. As set forth more fully below, EKR has demonstrated adequate grounds for review and the importance of the issues involved. Because there are important constitutional and social policy considerations which should be reviewed by this Court, EKR respectfully requests that this Court grant the Petition.

I. The Overwhelming Merit Of The Petitioners' Challenge Warrants Issuance Of A Writ Of Certiorari.

The Respondents argue that EKR has petitioned this Court because it was unsuccessful in its attempt to site a solid waste landfill in Magoffin County, Kentucky. The Respondents then proceed to ignore the merits of EKR's claim.

In contrast, EKR has set forth significant reasons for the Supreme Court to grant EKR's Petition for a Writ of *Certiorari*. Most importantly, and as discussed more fully in the Petition, Senate Bill 2, in conjunction with the actions of the Magoffin County Fiscal Court, clearly violate the Commerce Clause both in intent and effect. Restrictions on the free flow of commerce because of out-of-state, or out-of-area, origins is an obvious violation of the Commerce Clause and must not be allowed to

---

[1] The Respondents to the Petition include the Fiscal Court of Magoffin County, Kentucky, Paul E. Patton, in his capacity as Governor of the Commonwealth of Kentucky and James E. Bickford, in his capacity as Secretary of the Natural Resources and Environmental Protection Cabinet of the Commonwealth of Kentucky.

stand. This important constitutional issue should be decided by the Supreme Court.

The Supreme Court should also grant this Petition because the United States Court of Appeals for the Sixth Circuit rendered a decision which is in conflict with the precedent of the Supreme Court and of the United States Court of Appeals for the Eleventh Circuit. (Petition 16-18).

These factors fully satisfy the requirements of Rule 10(a) of the Rules of the Supreme Court of the United States ("United States SCR"). Moreover, the Petition fully satisfies the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1) and United States SCR 14.1(g)(ii).

II. The Burden Rests Upon The Respondents To Show That EKR Has Not Demonstrated The Fact Of Differential Treatment.

In its Petition, EKR set forth the legal framework to determine whether a state statute which burdens the free flow of interstate commerce violates the Commerce Clause. The first method of analysis is applied when a statute discriminates against interstate commerce either on its face or in practical effect. The Supreme Court has recognized a virtual *per se* rule invalidating any regulation which discriminates against interstate commerce on its face or in practical effect. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-623 (1978).

The second method of analysis considers apparently neutral regulations. This method of analysis states:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only

> incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Respondents argue that while EKR charged that the Court of Appeals had erred in applying the *Pike* balancing test instead of the *per se test*, EKR has failed to carry its evidentiary burden demonstrating the existence of differential treatment. (Response 9).

The position taken by the Respondents is in contradiction to both the procedural stance of this case and the evidence that was made part of the record at trial.

This case was decided by the District Court on a Summary Judgment motion pursuant to Federal Rule of Civil Procedure 56. Summary Judgment may be granted as long as there are no genuine issues of material fact, and materiality is governed by the substantive law of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In addition, "[o]n a Motion for Summary Judgment, disputed issues of fact are resolved against the moving party." *General Electric Co. v. Joiner*, 118 S.Ct. 512, 517 (1997).

The authority of the Supreme Court is clear. The burden rests upon the Respondents to demonstrate that no material issue of fact exists. Instead, Respondents argue that the burden rests on EKR to demonstrate the existence of differential treatment. (Response 9).

Despite the fact that the burden rests upon the Respondents to show that no material issue of fact exists, EKR

has demonstrated that a material issue of fact indeed did exist. EKR does not ask the Supreme Court to review the evidence entered at trial, rather EKR respectfully requests the Supreme Court to review the legal conclusions made by the trial court and the Court of Appeals in light of this evidence. For the reasons set forth below, and in fuller detail in EKR's Petition, it is clear that the District Court and the Court of Appeals are both in error.

A. The Passage Of Statutes And Regulations With The Intent And The Effect Of Prohibiting Interstate Movement Of Goods Violates The Commerce Clause.

EKR demonstrated in its Petition that the passage of Senate Bill 2 and the actions of the Magoffin County Fiscal Court regarding EKR's proposed solid waste landfill were motivated by an intent to prohibit the flow of solid waste into the Commonwealth of Kentucky and Magoffin County. In addition, the acts of the General Assembly and the Magoffin County Fiscal Court have had the effect of preventing the free flow of out-of-state waste. Respondents argue that the opinions of former Governor Brereton Jones and County Judge Executive Charles Hardin are irrelevant as their actions occurred after the passage of Senate Bill 2. Yet, the Respondents' analysis misses the mark. There are two distinct levels at which the provisions of Senate Bill 2 violate the Commerce Clause.

At the first level is Senate Bill 2 itself. Senate Bill 2 was the result of recommendations arising from a study prepared by the University of Kentucky entitled, *Kentucky Solid Waste Management Study: Issues And Opinions*, September 17, 1990 (the "Solid Waste Study"). The Solid Waste Study provided the framework and most ably explains the motivations of the Kentucky Legislature in its passage of Senate Bill 2. As has

already been explained, the goal of stopping out-of-state solid waste was an essential theme of the Solid Waste Study.

Yet, examination of Senate Bill 2 and the history of its passage is only part of the picture. One must also understand the operation of Senate Bill 2 at the local level. Senate Bill 2 provides for local governmental units such as Magoffin County to design solid waste management plans that are approved at the state level by the Natural Resources and Environmental Protection Cabinet. As the Petition explains, public servants, from the Governor of the Commonwealth to candidates elected to the Magoffin County Fiscal Court, stated that their intent was to prevent the flow of out-of-state waste into the Commonwealth of Kentucky generally, and Magoffin County specifically. (Petition 9-10).

Because Senate Bill 2 provides an avenue for localities to discriminate against the free flow of out-of-state waste, it is in clear violation of the Commerce Clause.

Furthermore, the results of Senate Bill 2 and the actions of the Magoffin County Fiscal Court have affected the flow of out-of-state waste. Since the passage of Senate Bill 2, of the 118 solid waste management areas in the Commonwealth, at least 85 areas provide no capacity whatsoever for out-of-area (and thus out-of-state) waste in their Cabinet-approved area plans. Despite the additional restrictions on out-of-state waste, the Court of Appeals stated that EKR failed to demonstrate how local economic actors are favored at the expense of out-of-state economic actors. (Petition 12). This decision, holding that the challenged provisions of Senate Bill 2 do not discriminate against interstate commerce because they also discriminate against some in-state commerce is in clear conflict with the Supreme Court's decision in *Dean Milk v. Madison*, 340 U.S. 349 (1951), and other decisions of the Supreme Court which

stand for the principle that "it is immaterial" for purposes of determining whether the legislation discriminates against interstate commerce, "that [other in-state commerce] is subjected to the same prescription as that moving in interstate commerce." *Id.*, at 354.

For these reasons alone, the present dispute is worthy of the Supreme Court's consideration.

B. Senate Bill 2 Has Raised An Important Policy Issue That Must Be Resolved By The Supreme Court.

The greatest danger posed by Senate Bill 2 is that it invites local governmental units to engage in activities that are clearly prohibited by the Commerce Clause. If the decision below is allowed to stand, it will "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause" *Dean Milk*, 340 U.S. at 356, and will effectively subvert the principle which was reiterated in *Dean Milk*, that "one state in its dealings with another may not place itself in a position of economic isolation. *Baldwin v. Seelig, Inc.*, [294 U.S. 511] at 527." *Id.*, at 356.

While the Respondents never deal with this issue, allowing the decision below to stand invites every state in the Union to enact similar legislation to deal with solid waste. By doing so, each county and each state could adopt policies similar to those adopted by Magoffin County and effectively halt the movement of all solid waste across state and county lines. Given the grave consequences that would result, a Writ of *Certiorari* should issue to review the decision below.

CONCLUSION

It is clear that Senate Bill 2 violates the Commerce Clause in both its intent and effect. The Bill was motivated by a desire to retard the flow of solid waste into the Commonwealth of Kentucky. As the Petitioner has demonstrated, Senate Bill 2 has also had the effect of retarding the flow of solid waste into the Commonwealth of Kentucky. In addition, Senate Bill 2 invites other states to enact similar legislation allowing local governmental units to create barriers against the free flow of commerce. Finally, as the Petitioner has already demonstrated in its Petition, the holding below stands in clear conflict with the precedents of the Supreme Court and the United States Court of Appeals for the Eleventh Circuit. (Petition 16-18). For these reasons, a Writ of *Certiorari* should issue to review the decision below.

Respectfully submitted,

WALKER P. MAYO III
Counsel of Record

RICHARD A. GETTY

BOWLES RICE MCDAVID
GRAFF LOVE & GETTY, PLLC
1200 Vine Center Tower
333 West Vine Street
Lexington, Kentucky 40507
(606) 225-8700

COUNSEL FOR PETITIONERS
EASTERN KENTUCKY RESOURCES, INC., ET AL.